


# HANDBOOK OF STATE AND FEDERAL EMPLOYMENT LAWS FOR MONTANA PUBLIC EMPLOYERS



Compiled by  
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Attorney at Law

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Ted J. Doney, Attorney at Law  
Helena, Montana**

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The conclusions contained herein are those of the author, and are not necessarily concurred in by the Labor Standards Division.

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Since the end of the Great Depression, labor law has been one of the most rapidly developing and vitally important areas of legislation affecting employment activities in our society, both to the employer and the employee. Today, employers, employees and organizations are expected to comply with a vast array of federal, state and local laws, administrative rules and court decisions affecting employment. Public employers face this problem as well. Indeed, in many instances, the problem is more acute for government employers because additional requirements are imposed on them that are not always imposed on private sector employers.

Public Employers Defined and Covered by Handbook. This handbook is written for public employers in Montana. It is intended to acquaint public employers with the basic requirements of employment law in nonlegal language. For purposes of this handbook, public employers include state government and all its agencies, local governments, and political subdivisions of government. Even though it is a public employer, the federal government is not covered, although many of the same requirements discussed in this handbook apply to it as well.

It is usually fairly easy to determine whether or not an employer is a part of state government. State agencies, the state institutions and the state University System are all part of state government and are included within the coverage of this handbook. Local government and political subdivision employers are more difficult to determine. Essentially, local governments and political subdivisions are units of government that owe their existence to the Legislature. They would not exist or have any power to perform some governmental function were it not for a law enacted by the Legislature that provides for their existence. Counties, cities and towns are all local governments; they are also political subdivisions of state government. Hospital, fire, bus transit, conservation, and even mosquito control districts are also political subdivisions of government; there are many others.

This handbook is intended to cover all such organizations. Where particular legal requirements vary from the typical public employer, such as minimum wages for firemen, that fact is pointed out.

List of Montana Public Employers -- Appendix A. A list of organizations in Montana that are covered by this handbook is included in Appendix A. This list is not exhaustive, but should be complete enough for most employers to decide whether they are in fact public employers and subject to the employment law requirements discussed in this handbook.



Categories of Labor Laws. Labor law, of which employment law is only a part, can be divided into three main categories. The first category relates to the combined activities of employees in relation to their employer, and deals with such problems as labor unions, collective bargaining, and the regulation of strikes. Federal laws, such as the National Labor Relations Act of 1935 (the Wagner Act) and the Labor Management Relations Act of 1947 (the Taft-Hartley Act), and some state laws, are included in this category of labor law. The relationship between labor unions and public employers is not covered in this handbook except for brief references in some instances.

The second category of labor law deals with the relation between employees and the labor union to which they may belong. Such issues as the internal affairs of labor unions and the election of union officers are included in that category. It is not covered by this handbook.

The third category of labor law deals with the subjects covered by this handbook, laws dealing with employment itself. The relationship between the individual employee and his employer, whether or not the employee belongs to a labor union or a collective bargaining unit, is covered in this category. Such basic areas of concern as minimum wages, overtime, child labor, discrimination in employment, federal contract compliance, prevailing wage laws, veterans' employment rights, nepotism (the hiring of relatives) and employees' rights and benefits are all included in this category.

Chapter Breakdown; Coverage of Handbook. This handbook consists of seven chapters, each addressing a different area of employment law. Chapter 1 describes the general legal relationship between an employer and an employee, a relationship which is essentially a legally binding contract between the employer and the employee: the employee agrees to perform a certain function for the employer and the employer agrees to pay so much for it. Chapter 2 discusses the legal requirements of hiring employees, employment preference rights, age restrictions, nepotism, and discrimination in hiring. In Chapter 3 wage laws are described, including minimum wage requirements, overtime pay, and method and time of paying employees. Laws governing the hours employees work are covered in Chapter 4. Employee rights and benefits are described in Chapter 5, covering such subjects as annual leave, sick leave, maternity leave, holidays, insurance coverage, and grievance procedures. Equal employment laws are briefly covered in Chapter 6. In Chapter 7, the laws governing the firing of employees is addressed.

Federal Versus State Law. Oftentimes, both federal and state laws apply in employment law situations. For example, there is a federal minimum wage law and a state minimum wage law, and there are federal and state age discrimination laws. These overlapping laws can create a good deal of confusion for the public employer. Whenever this occurs, this handbook attempts to distinguish between the federal and state requirements and emphasize which law applies when.



Supplements to Handbook. Due to the continuing evolution of employment law, the handbook is designed so that it can be readily updated with supplements. The reader should make sure that the latest supplements are inserted before relying on the handbook as an up-to-date source of information. If unsure, the reader should check with the Labor Standards Division of the Montana Department of Labor and Industry, Capitol Station, Helena, Montana 59620 (449-5600).

Laws, Rules, Appendices and Forms. In the back of the handbook are important laws and rules, as well as appendices and forms, for ease of reference and use by the public employer. The appendices and some of the forms are referred to in the text where applicable. An index of laws, rules, appendices and forms appears before each applicable section in the back of the handbook.



CHAPTER 1.  
THE EMPLOYMENT  
RELATIONSHIP



## CHAPTER 1. THE EMPLOYMENT RELATIONSHIP

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### A. Generally

The Employment Contract. When someone is employed by an employer, an employment contract exists. An employment contract is like any other legal contract; once it is made, it is enforceable by either party to the contract according to its terms.

A contract of employment occurs when there is an agreement between the employer and the employee on the terms of the contract. Usually, employment contracts result from verbal discussion and are not written, but they are as legally binding as a written contract. The only requirement to create an employment contract is that one party to the contract makes an offer and the other party accepts that offer. For example,

if the employer says, "I will pay you \$5.00 per hour to be my secretary" and the potential employee says "okay" or starts work, an employment contract then is made. Other terms of the employment relationship may not have been discussed, such as hours of work, holidays, quality of work performance or duration of employment. Oftentimes, these terms are dictated by laws and personnel policies of the employer, both of which are discussed in subsequent chapters.

Although an employment contract can exist by oral agreement, written contracts usually are far less subject to misunderstanding. However, even written employment contracts contain provisions implied by court decisions. For example, under a recent Montana Supreme Court case there is an implied "covenant of good faith and fair dealing" in all employment contracts.

All employers, including public employers, should be aware of this general contract law applicable to employment. In many instances, an employer has offered someone a job and the potential employee has accepted, creating an employment contract, and then later the employer has tried to rescind the employment offer for some reason. This not only creates bad relations for the employer, but can result in the employer being sued and held liable for damages for breach of contract. Therefore, an employer should not offer to employ someone until the offer is definite; or, if the offer is contingent upon some other factor, such as receipt of federal funds or approval of a superior, then that should be made clear to the

potential employee so there are no misunderstandings.

Employee and Independent Contractor Defined. The law books are full of court cases and discussion of the terms "employee" and "independent contractor." For purposes of this handbook, only a general definition can be given.

Generally, an "employee" is someone who is hired by an employer and who performs some service or function while under the direction and control of the employer. An "independent contractor," on the other hand, is someone hired by an employer who performs a service or function essentially independent from the employer and outside the employer's direction and control. Of course, there are different degrees of control, and the circumstances will vary from one situation to another. Therefore, the law that has developed over the years on this question has adopted several factors or tests that are used to determine the degree of control. Some of these tests are: (1) direct evidence of control by the employer; (2) the method of payment; (3) the furnishing of equipment; and, (4) the right to fire the person or entity employed.

For example, if the employer exercises (or has the right to exercise) control over how a particular job is to be done and not just act over the results, and can add to the duties of the person employed beyond those agreed to when the person was hired, this is direct evidence of employer control. Additionally, if payment is made on a time basis (by the hour,



day, week, etc.), rather than on a completed contract basis, the person performing services is more likely to be an employee than an independent contractor. If the employer furnishes the equipment to be used, an employee-employer relationship may be indicated. If the worker furnishes the equipment, an independent contractor relationship is indicated, but only if the equipment furnished by the contractor is significant, such as a computer or a road grader, not something like a chain saw or a typewriter. Finally, if the employer maintains the right to fire the person employed without liability, and at any time, an employee-employer relationship probably exists.

Application of the above tests must be approached with caution because circumstances are different in each case. In fact, slightly different tests might be applied to each situation, depending on the employment law under which the question arises. Usually, at least in the application of minimum wage laws, workers' compensation laws and other laws having social goals, the courts tend to find an employee-employer relationship, rather than an independent contractor relationship. Evidence of the direction that courts take can be seen in the legal rule that all four of the above tests must be met to establish an independent contractor status, while only one need be met (on the other side of the test) to establish an employee relationship. There is a presumption that an employee-employer relationship exists, unless the employer can prove that all four tests have been met. There is no such relationship as "contract labor." A contract



for labor creates an employee-employer relationship.

In most cases, it will be fairly easy to determine whether someone is an employee and therefore entitled to minimum wage, overtime compensation, and other employee benefits, or an independent contractor and therefore exempt from these benefits. In nearly all cases of persons working for a public employer, they are employees.

Examples of Independent Contractors. The following are examples where an independent contractor status probably exists:

- (1) A lawyer on retainer to defend the employer in a lawsuit;
- (2) Clerical work contracted through an independent, established secretarial firm on a project basis;
- (3) Agreements with professional consulting firms.

Administering Agencies -- Appendix B. More will be said about employees and independent contractors in the context of the particular employment laws being discussed. If questions arise, the public employer should check with the government agency administering the law under which the questions arise. A list of employment laws, the agency or agencies administering each one, and addresses are included in Appendix B.

#### B. Obligations of Employer

Occupational Health and Safety. When an employee-employer

relationship is established, the employer has certain legal obligations to the employee, and vice versa. The particular obligation which an employer owes to his employee will depend on the type of employment, the terms of the employment contract, and applicable laws, several of which are described in this handbook. Generally, however, the employer must see that the workplace is reasonably safe, and must furnish equipment and suitable facilities in which to work. The obligation of an employer to provide a safe workplace becomes more important as the job safety risks increase. Today, of course, federal and state laws dealing with occupational health and safety provide for work safety in great detail. Those laws are described in Chapter 5.

Medical Care to Employees. An employer is under no general legal obligation to provide medical care to an employee who is injured or who becomes ill while working, although an employer may assume such obligation by contract or by his conduct. Additionally, in emergency situations where the life or serious bodily injury to an employee is threatened, the employer probably has a legal obligation to care for or furnish medical aid. Workers' Compensation insurance provides compensation to the employee for his injuries and medical expenses.

Seating. A law enacted by the Montana Legislature in 1913 requires an "establishment" employing any person to provide suitable seats for all employees. Whether this law

applies to public employers is not clear, but common sense dictates that all public employers should comply. In today's workplaces the unavailability of chairs probably is not a problem.

Liability of Employers. The liability of public employers for their employees' activities is discussed in part E of this chapter.

### C. Obligations of Employee

Competence; Obedience; Performance. Besides the obligations imposed on an employee in the employment contract between the employer and the employee, the law implies other general obligations on an employee. For example, the employee must be competent to perform the duties for which he was hired, and he must work in a careful and workmanlike manner. The employee must obey the lawful rules, orders and instructions of the employer, at least insofar as they are not unreasonable. An employee must conduct himself so as not to injure the business of the employer, which means that employees of public employers have an implied obligation to perform their duties in such a manner that will enable public employers to meet their obligations to the public.

Terminating Employees. See Chapter 7 for the situations in which an employee can be fired for failing to meet his obligations to an employer.

#### D. Prohibitions on Employer

Montana laws contain various provisions prohibiting certain activities by employers. Nearly all of these relate to hiring or firing of employees and are therefore covered in Chapters 2 and 7.

#### E. Liability of Employer

The subject of the liability of an employer arising out of an employee-employer relationship constitutes a large part of the law regarding employment. It is a subject which is essentially outside the scope of this handbook. However, some general principles can be stated which may be helpful to the public employer in Montana.

Injuries to Employees. Until the advent of workers' compensation laws and other employers' liability laws, an employer generally was not liable for injuries to employees in the discharge of their duties, unless the injuries were caused by the negligence of the employer. Today, however, the workers' compensation laws do away with the requirement of negligence and give employees the right to be compensated for injuries related to their employment. Nearly all employers, including public employers, are required to participate in the compensation system, as explained in Chapter 5.

Injuries Caused by Employees. An employer can also be liable for injuries to third persons (outside parties) inflicted by an employee. It is universally recognized in law

that an employer is liable for injuries to the person or property of third persons occasioned by the torts, negligence, frauds, deceptions, concealments, misrepresentations and other malfeasance or misfeasance of his employee, which, even though not directly authorized or approved by the employer, are within the scope of his employment. In layman's terms, this means that if an employee makes a substantial mistake or is careless and causes damages, the employer might be liable.

Sovereign Immunity. Historically, public employers were generally immune from liability on the legal theory that the king (the government) could do no wrong. This immunity is called the doctrine of sovereign immunity. In Montana, however, this doctrine was abolished by the new Montana Constitution adopted in 1972, except that the Legislature is authorized to reinstate sovereign immunity and limit liability of public employers. The Legislature exercised this exception in 1977 and again in 1983 after its action in 1977 was declared unconstitutional by the Montana Supreme Court, and has limited liability of public employers to a maximum of \$300,000 for each claimant and \$1 million for each occurrence.

Claims Against a Public Employer. Under Montana law, if an injured person thinks he has a claim for money damages against the state government, he must file a claim for damages with the State Department of Administration. If the claim is against a local government or political subdivision, it must be filed with its clerk or secretary. This claim filing is a



required first step before the claimant can sue the public employer in court.

Liability Insurance. Public employers in Montana may carry liability insurance to cover their liability for damages, or they can elect to self-insure (pay for damages out of public funds). Political subdivisions and local governments can combine to procure liability insurance if they wish. In addition, if an employee of a public employer is sued for damages, the public employer must pay for the employee's legal expenses and damages awarded, unless the employee is found by the court to be liable personally and not as an employee acting within the scope of his employment.

Personal Liability. It is possible that public officers and public employees can be liable personally for damages. This usually occurs when the official or employee commits some injurious act outside the scope of his government job. For example, as a result of one lawsuit in the early 1940's in Montana, a game warden might be liable personally for seizing and confiscating a rifle from a hunter who was hunting game illegally. The law did not authorize the game warden to confiscate such property as a part of his enforcement powers; therefore, he acted outside the scope of his employment.

CHAPTER 2.  
HIRING  
REQUIREMENTS





## CHAPTER 2. HIRING REQUIREMENTS

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### A. Generally

The public employer is often confronted with several laws requiring preference in hiring (veterans' preference laws, for example), age restrictions (child labor laws), and other laws establishing prohibitions or preferences on the employer when a decision is made to hire an employee. Hiring requirements and restrictions can often be confusing and frustrating for

the employer; mistakes easily can be made that may lead to lawsuits and considerable expense. This chapter describes and discusses the most important employment laws that apply to public employers at the hiring decision stage.

It should be noted that several requirements may be involved before a decision is made to hire an employee. Equal employment and civil rights laws may require the adoption of affirmative action plans to help insure that employees are hired in a nondiscriminatory manner; even if plans are not adopted, hiring of employees by public employers cannot be conducted so as to discriminate against certain individuals or classes. These requirements are discussed briefly in Chapter 6. In addition, the employer may have adopted its own recruiting and hiring policies, such as policies dealing with advertising vacant positions, notifying existing employees of vacant positions, job application procedures, time periods to apply, interviewing, and so forth. Those policies, once lawfully adopted, should be followed. In fact, in many instances the public employer is required to follow such policies. (See Chapter 5 for a more thorough discussion of personnel policies and procedures.) This chapter assumes that steps leading up to a hiring decision have been correctly followed.

Finally, from a legal viewpoint, the hiring of an employee constitutes a contract. See Chapter 1 for a discussion of the employment contract.

## B. Employment Preference

### 1. Veterans

State Law. Montana, as most states, has adopted employment preference laws for hiring and rehiring veterans and even for certain relatives of veterans. They are described below.

Veteran Employment Preference -- State Government, Cities and Counties. Every "public department" of the State of Montana (apparently meaning all agencies and institutions of state government) and cities and counties must give veterans, their spouses and surviving spouses (widows or widowers), and the other dependents of disabled veterans, a preference for appointment and employment. The law applies to employees of state government, cities and counties; it may also apply to persons hired by private contractors working on public works (construction projects) of the state, cities and counties, although the statute is not clear on that point. It also applies to public officers of those public employers; one Montana Supreme Court case even applied the preference to the position of city attorney. The law probably would be interpreted to apply also to political subdivisions of state government, cities and counties, since it applies to state government, cities and counties themselves.

What Constitutes a Preference. What constitutes a preference is not made clear in the statute. As interpreted by the Montana Supreme Court in a 1983 case (Crabtree), pref-

erence means that the veteran (or his or her spouse or dependent, as the case may be) must be hired over everyone else if that person meets only the minimum qualifications for the position -- it is an absolute preference. In addition, if an oral or written examination is required for employment (such as under the state merit system), extra points must be given for persons covered by the preference law (10 points if a disabled veteran or a spouse, surviving spouse, or dependent of a disabled veteran, and 5 points for all other veterans and their eligible relatives).

Re-employment of Veterans. Another state law provides that any individual drafted into the armed forces or any reservist who is called into active duty, and who must leave his position of employment, is entitled to his old job back or a position with similar seniority, status and pay when he returns from the military. Application for re-employment has to be made within 90 days after discharge. All employers (public and private) are covered by this law.

Federal Law. Congress has enacted veteran employment laws similar to Montana's, but they apply only to federal and private employers. A federal re-employment of veterans law, however, similar to the state law described above, does apply to state and local governments.

## 2. Disabled Civilians

Also contained in Montana's veterans' employment preference law is a requirement that "disabled civilians"

recommended by the Rehabilitative Services Division of the State Department of Social and Rehabilitation Services be given a preference in appointment and employment. The requirement applies to the same public employers and in the same manner as the state veterans' preference described above.

### 3. Montana Labor -- Public Works Contracts

Montana Law. Contracts for state, county, municipal, school, and heavy highway construction, services, repair, or maintenance work must contain a provision requiring the contractor to give preference to employment of Montana residents. This requirement covers contracts let by state government, and cities, towns, counties and school districts. It is also applied to political subdivisions such as hospital and fire districts. Since the law includes all construction, service, repair and maintenance contracts, it is rather comprehensive in its coverage.

Conflicts with Veteran Preference. For contracts involving federal-aid funds, if there is a conflict between the Montana labor preference and the federal veterans' preference discussed in part 1 of this chapter, then the veterans' preference takes precedence.

### C. Child Labor

State Law. Employment of children under the age of 16 in dangerous, unhealthful or immoral occupations is prohibited by Montana law. What is a dangerous, unhealthful or immoral oc-



cupation is not defined, but employment in mines, mills, smelters, railroads and elevators or where any machinery is operated is specifically included. In addition, the employment of children under the age of 18 as bartenders, waiters, waitresses or any other similar jobs which involve serving customers liquor, beer or wine in an establishment which sells those products is also prohibited. These laws apply to public as well as private employers.

Federal Law. The federal Fair Labor Standards Act prohibits the employment of children by any covered employers, including public employers, in what is termed "oppressive child labor." The law itself and regulations adopted by the Secretary of Labor prohibit employment of minors below a certain minimum age; the minimum age that is established is based upon the type of employment.

For example, 16- and 17-year-olds may be employed at any time in any occupation, except a nonagricultural occupation which has been declared hazardous by the Secretary of Labor. Children under 18 years of age cannot be employed in occupations such as driving motor vehicles; working with explosives; certain woodworking, metal working, bakery, paper products, and meat-processing work; work with circular and band saws, guillotine shears and hoisting machinery; work in logging and sawmilling; mining, roofing and demolition; and some excavation work. Public employers could be involved in some of these hazardous occupations, such as driving motor ve



hicles or helping on a refuse truck; operating saws in a highway department sign shop; or using a meat slicer in the kitchen of a school, nursing home, or hospital. There are even stricter rules for employment of 14- and 15-year-olds, including limits on their hours of employment. Employment of minors under 14 years of age is prohibited, except in occupations like delivery of newspapers, casual labor around a private home, and certain kinds of agricultural employment.

There is some question whether the federal child labor laws and regulations described above apply to state and local governments and political subdivisions. The United States Supreme Court ruled in 1976 in the National League of Cities v. Usery case that the minimum wage and overtime provisions of the federal Fair Labor Standards Act cannot constitutionally be applied to those state and local government activities which have been "traditionally" exercised by such entities. Since the federal child labor laws are part of the same Act, but were not mentioned in the Supreme Court decision, the United States Department of Labor takes the position that the federal child labor laws still apply to all public employers. That position has not been tested in the courts. (See Chapter 3 for a more thorough discussion of this court ruling.)

#### D. Nepotism

Nepotism Defined. Nepotism is the appointment or employment of a relative by a public official. Montana has had a law prohibiting this practice since 1933. Because

questions frequently arise concerning the application of Montana's law, it is discussed at length below.

The Montana Nepotism Law. The nepotism law in Montana prohibits any person or any member of a board, bureau or commission, or the head of any department of state government or any political subdivision from appointing a relative to any position of "trust or emolument." What is a position of "trust or emolument" is not defined in the statute, but it means any job where the employee has duties to perform for the employer or gets paid (which amounts to nearly every position). Relatives are defined to mean persons related to the board member or department head by blood relationship (consanguinity) within the "fourth degree" or by marriage (affinity) within the "second degree."

Degree of Relationship. Figuring out degrees of relationship can be confusing. The easiest way is to think of a degree as each step that must be taken on a family tree to get to the relative in question, except that the step from the appointing person to his or her own spouse is not counted (however, a husband and wife are considered to be related to each other by one degree). Start counting the steps from the appointing person to the relative, and not vice versa.

Examples of Relatives Covered. A person's spouse, father, mother, son and daughter are all relatives of one degree. Grandchildren and grandparents are relatives of two

degrees. Aunts and uncles are relatives of two degrees (one step to the parent and one step to the brother or sister of the parent). A son-in-law is a relative by marriage of one degree (remember that the first step to a spouse is not counted).

Application of the Nepotism Law. Once the method of figuring out which relatives are covered under the law is understood, other legal questions also arise. Some of these questions have been answered by the courts or by official opinions of the Montana Attorney General. The answers are summarized as follows:

- (1) The law applies to all agencies of state government and to all political subdivisions, including school boards, county commissioners, and similar bodies (any public employer covered by this handbook -- see Appendix A);
- (2) The law applies to boards and commissions even though only one member would be related to the person to be appointed;
- (3) The law cannot be evaded by temporarily resigning or by abstaining from voting;
- (4) An adopted person is considered to be in the same position as if he or she were related to the adopting parent by blood;
- (5) The law restrains only the appointing authority, not a higher authority who only confirms or votes for the confirmation of an appointment already made.

Specific Situations. The following are specific situations which have arisen in Montana and which have been ruled upon by the courts or the Attorney General:

- (1) There is no violation of the nepotism law where a contract of employment for a tenured teacher is to be renewed by the school board and one of the board members is a relative of the teacher (tenured teachers have constitutional rights which cannot be taken away by a nepotism law);
- (2) A newly elected trustee of a school board whose relative was hired during a previous board term may serve on the board without violating the nepotism law if the relative's employment is continuous and not subject to rehiring during the new trustee's term;
- (3) It is prohibited nepotism for a city mayor to appoint a son-in-law as police chief, even if the son-in-law is the most qualified person for the job;
- (4) It is illegal for a school board to accept the resignation of a board member's sister-in-law as administrative secretary and then reappoint the resigned member back to the board;
- (5) A city alderman is not prohibited from voting to confirm the appointment of his son by the mayor.

The Human Rights Act and Nepotism. The Montana Human Rights Act may have nullified the nepotism law in certain instances. (See Chapter 6 for a description of the Human

Rights Act.) The Attorney General has ruled that the Human Rights Act overrides the nepotism law insofar as the employment of relatives related by marriage is concerned, because the Act prohibits discrimination based on marital status, and the prohibition against hiring a marriage relative would be discrimination based on marital status. Therefore, the hiring of relatives related by marriage would be legal under this interpretation. However, this interpretation has not been specifically tested in the courts.

Agreements Between Employers. Under Montana law, it is also illegal for an appointing authority to make an agreement with another appointing authority to appoint a covered relative. For instance, it would be illegal for the alderman in the last example above to get the mayor to agree to appoint the alderman's son. Similarly, it would probably be illegal for a public official to agree with another public official to appoint a relative of the other public official.

Purpose of Nepotism Law; Penalties. The purpose of the nepotism law is to reduce political patronage and appointment of unqualified people to public positions. Sometimes, it can have the opposite effect. Nevertheless, it is a law that must be strictly observed. It is violated frequently because of a lack of knowledge of its existence on the part of the public employer. Failure to comply with its provisions can result in criminal penalties and invalidation of an appointment.



#### E. Equal Employment and Discrimination

As was mentioned at the beginning of this chapter, equal employment and discrimination laws must always be taken into consideration when hiring employees. Today these laws have wide-ranging ramifications on public employers, and prohibit discrimination in hiring based on sex, race, national origin, age, handicap, political beliefs and marital status. Because of the breadth of this subject, Chapter 6 is devoted exclusively to this topic.

#### F. Miscellaneous Hiring Requirements

Medical Examination. It is unlawful under Montana law for any employer to require an applicant for employment to pay for the cost of a medical examination or the cost of furnishing records of a medical examination as a condition of employment. The law apparently applies to both public and private employers.

Lie Detector Tests. Lie detector tests are prohibited as a condition of employment, except for public law enforcement agencies.

Employment of Aliens. No employer may knowingly employ an alien who is not authorized to accept employment in this country.



**CHAPTER 3.**  
**WAGES AND**  
**WAGE PROTECTION**



## CHAPTER 3. WAGES AND WAGE PROTECTION

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#### A. Generally

Nearly all employees in Montana, public and private, are entitled to a minimum wage or to wage protection under various state and federal laws. The federal Fair Labor Standards Act (also known as the Wage and Hour Law or the FLSA) enacted by Congress in 1938 regulates the wages and hours of employees engaged in commerce or in the production of goods for commerce. With some exceptions, it establishes a minimum hourly wage that must be paid to such employees; since January 1, 1981, the minimum wage has been \$3.35 per hour. The FLSA also requires that such employees be paid at a rate of 1½ times their regular hourly rate for hours worked in excess of 40 hours during any workweek (also called "time and one-half for overtime"). Similarly, a state minimum wage and overtime law which was enacted in 1971 is intended to cover most employees not covered by the federal law. Under the state law

the minimum hourly wage is currently set at \$2.75 an hour; it also requires time and one-half for hours worked in excess of 40 hours in any workweek.

Under the federal and state wage and overtime laws, and other laws, employees are also entitled to be paid in a certain manner. In addition, employees of contractors doing construction work for state and local governments are entitled to be paid a "prevailing wage" pursuant to the federal Davis-Bacon Act and a similar law enacted in Montana.

The application of all these laws as they relate to wages and wage protection of public employees is discussed in this chapter. Due to the complexity of these laws and the questions that frequently arise concerning which law applies to a given situation, they are discussed in detail.

## B. Minimum Wage Requirements

### 1. Federal Versus State Law

Federal and State Coverage. The federal Fair Labor Standards Act, when originally enacted in 1938, did not cover employees of state and local governments. In 1971 the Montana Legislature enacted a state minimum wage and overtime law patterned after the federal Act to cover employees of state and local government in Montana. Then in 1974 Congress amended the federal Act to cover such employees also.

The National League of Cities v. Usery Case. The ques-



tion of which minimum wage and overtime law now applies was basically resolved by the United States Supreme Court in 1976 in the case of National League of Cities v. Usery. The Court held that the imposition of federal wage and overtime requirements on state and local governments was unconstitutional as applied to the integral operations of states and their political subdivisions in areas of traditional governmental functions. According to the Court, areas of traditional governmental functions include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, among other exclusions, the operation of a railroad by the state.

Federal Interpretation. Application of the Supreme Court's test of "traditional governmental functions" is sometimes difficult. The Wage and Hour Division of the United States Department of Labor has interpreted the Court's ruling to mean that libraries and museums are traditional functions of state and local governments, but that the sale of alcoholic beverages through state liquor stores is not. So it would appear, at least as interpreted by the federal agency administering the FLSA, that Montana's state-owned liquor store employees come under the federal minimum wage and hour overtime law and not the state law.

Attorney General's Interpretation. The Montana Attorney General has taken a different approach. In an opinion issued

by him in 1980 (38 OP. ATT'Y GEN. NO. 83), the Attorney General flatly stated that "The FLSA no longer applies to state, county, or municipal employees." The Attorney General's opinion, which cites the National League of Cities case as the basis for his ruling, conflicts with the current view of the federal government, as discussed above. Of course, the federal government is not obligated to follow the Attorney General's opinion.

Practical Application. As a practical matter, the problem of which law applies makes little difference. The primary distinction between the federal and state minimum wage and overtime law as it applies to public employees is the level of the minimum hourly wage set by each: \$3.35 per hour by federal law, and \$2.75 per hour by state law. In all other respects the federal and state laws and the rules adopted under them by the administering agencies are nearly identical, including the exemptions under each. Furthermore, the National League of Cities case has essentially excluded most activities of state and local government in Montana from the federal law. Therefore, if employees covered by the state law are being paid \$3.35 per hour or more, and all other requirements of the state law are complied with as discussed in this chapter, compliance with the federal law if it applies is also assured.

Since nearly all employees of state and local government are paid at least \$3.35 per hour, and most functions of state

and local government in Montana are excluded from the federal minimum wage and overtime law as a result of the National League of Cities case, it is not necessary to describe the federal law in detail in this chapter. In those few instances where a public employer plans on paying an employee less than \$3.35 per hour, and all requirements of the state law are complied with, the employer should check with the appropriate federal or state agency listed in Appendix B to determine whether the federal or state law is applicable.

It must be emphasized that the National League of Cities case did not decide the constitutionality of other parts of the FLSA, such as child labor and equal pay laws. Therefore, it should be assumed that those parts are still applicable to state and local governments.

## 2. State Minimum Wage Law

Generally. The state minimum wage law requires, with certain exceptions, that every employer must pay wages at a minimum hourly rate, currently set at \$2.75 per hour.

Construction of Law. The courts have uniformly held that since laws such as the state minimum wage and overtime law are remedial in nature and designed to achieve social goals, they should be construed liberally in favor of the employee. Any doubt as to the interpretation or application of the law should therefore be resolved in favor of coverage of the employee. This means that the exemptions from the law,

discussed later in this chapter, should be strictly construed against the employer so that any doubt is resolved in favor of the employee.

Effect on Employment Contracts. Employment contracts, such as individual agreements between the employee and the employer and collective bargaining agreements between a union and an employer, made in violation of the law, are ineffective. Employees cannot contract away or waive the rights given them under the law. Therefore, any agreement between an employer and employee in which the employee (or group of employees) agrees to be paid less than the minimum wage, or to accept overtime compensation that is less than that mandated by the law, will be void. Employment contracts are valid insofar as they provide for minimum wage and overtime<sup>11</sup> compensation at rates at least equal to those prescribed by the law and the rules adopted thereunder by the administering agency (the Montana Department of Labor and Industry). Therefore, it is always possible for an employer to give employees more benefits than required by the law; for example, an employer could decide (by agreement or policy) to pay employees time and one-half for overtime in excess of eight hours a day if it wished.

An employment agreement may specify a weekly, monthly or yearly salary for an employee, provided the employee is still paid the required minimum wage per hour. Determining compliance is done easily by dividing the weekly salary by the number of hours actually worked during that workweek; the

result must equal or exceed the minimum wage. How salaries and hours actually worked are determined is described later in this chapter.

What Constitutes Wages. The term "wages" as used in the state minimum wage law means the compensation due to an employee for his employment, payable in legal tender of the United States or checks on banks, convertible to cash, subject to such allowances as may be permitted by regulations of the Commissioner of the Montana Department of Labor and Industry. Wages also include the reasonable cost to the employer, as determined by the Commissioner, of furnishing an employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by the employer to its employees; however, the reasonable cost of such board, lodging or other facilities cannot exceed 40% of the total wage paid to the employee.

The Commissioner of Labor and Industry has adopted several regulations implementing this provision of the law. Among other things, he has determined that the cost of facilities furnished primarily for the benefit or convenience of the employer will not be recognized as reasonable, and may not be included in computing wages. The cost of uniforms where the nature of the job requires the employee to wear a uniform is an example. In addition, to be included in the calculation of wages, the employee must not only receive the benefits of the item furnished, but his acceptance of it must



be voluntary and uncoerced. This would mean, for example, that the cost of furnishing lodging and meals to employees who are required to stay in the employer's facilities cannot be included in the calculation of wages.

### C. Overtime Compensation

#### 1. Generally

The state overtime compensation law requires, with certain exceptions, that employees must receive  $1\frac{1}{2}$  times their regular hourly wage rates for employment in excess of 40 hours in a workweek. Student employees at amusement or recreational areas that operate on a seasonal basis and who are furnished their board, lodging, or other facilities are entitled to  $1\frac{1}{2}$  times their hourly wage rate for hours worked in excess of 48 hours in a workweek.

The Workweek. The "workweek," consisting of seven consecutive 24-hour periods, is the standard measure of time for computing compliance with the overtime compensation law. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Each workweek stands alone, so that hours worked during two or more weeks may not be averaged to avoid overtime pay.

Different workweeks may be established for each employee, but once established, a workweek remains fixed regardless of the schedule of hours the employee works. However, the



workweek of an employee can be changed by the employer if it is intended to be permanent and is not designed to evade the overtime requirements of the law. The rules of the Commissioner specify how the employee's wages are to be calculated when a change in workweek occurs.

Once the workweek for an employee is established, compliance with the overtime compensation law is determined by totaling the number of hours worked by the employee in that workweek. If the total exceeds 40 (48 in the case of students employed at recreational areas as described previously) the employee must be paid time and one-half for the excess hours.

The Overtime Rate. The overtime compensation law does not prohibit paying more than  $1\frac{1}{2}$  times the regular hourly rate. Employers must pay the overtime rate, however, even where the employee is paid an hourly wage greater than the minimum wage. Thus an employment agreement which establishes an overtime rate less than  $1\frac{1}{2}$  times the regular rate would be void (unless, of course, the employee is exempt from the overtime compensation law, as described in part E of this chapter).

What Constitutes Overtime. Overtime has a variable meaning under the overtime compensation law, depending on the particular situation. It can be work after regular hours, work beyond hours prescribed by contract which are less than the statutory maximum number of hours (40 or 48; see discussion above), or work outside the regular work pattern,

as for example, work on weekends or holidays.

Overtime includes hours worked by the employee in excess of the maximum which the employee is actually "suffered or permitted" to perform. This means that even though the employer has a policy that no overtime will be allowed unless it is specifically approved in advance, the employee is still entitled to time and one-half for overtime hours actually worked with the knowledge and acquiescence of the employer.

In instances where an employee has two jobs, each employer is treated separately if each is acting independently of the other. But if the multiple employment is interrelated, the employee is treated as if he works for only one employer; and the employee's total work in both jobs is used to determine eligibility for overtime compensation.

The calculation of overtime hours is further described in the discussion of working time later in this chapter.

The Regular Rate. The overtime compensation rate is computed from the "regular rate" at which the employee is paid. The regular rate is the hourly rate actually paid for the normal non-overtime workweek. If there is an employment contract specifying the number of working hours for which a fixed weekly or monthly compensation is paid, as would be the case in most instances with public employees, the regular rate is determined by dividing the total weekly compensation by the number of working hours agreed upon in the contract. If an

employment contract does not expressly specify such hours (although it is implied), the regular rate of pay is calculated by dividing the employee's total compensation each week by the total hours worked. The employee is then entitled to be paid  $1\frac{1}{2}$  times the derived regular rate for hours worked in excess of the maximum.

Under the law, it makes no difference if the employee is paid an hourly wage or a salary by the week, month or year, as long as he is otherwise covered by the law. When the employee is paid on a weekly, monthly, or yearly basis, the salary is simply reduced to its workweek equivalent to calculate the regular hourly rate. For example, if the employee is paid semi-monthly by contract the semi-monthly salary is multiplied by 24 (the number of pay periods in a year) and divided by 52 (the number of weeks in a year) to determine the weekly wage. Once the weekly wage is calculated, the regular rate per hour is calculated as described above.

The regular rate is deemed to include all compensation paid to the employee for employment, except the following: pay for vacations, holidays, illness and other periods when no work is performed; payment for travel and other similar expenses; contributions to retirement systems; and overtime payments, including overtime payments paid for work on weekends, holidays or other days of rest.

## 2. Working Time

Generally. In calculating the number of hours worked

each workweek by an employee to determine whether or not the employee is entitled to overtime pay, problems frequently arise in defining the extent of the hours worked, or working time. For example, are travel time and paid holidays to be counted as working time? In general, working time includes time spent in physical or mental exertion controlled or required by the employer and pursued primarily for the benefit of the employer; however, inactive time spent for the benefit of the employer can also be working time, as discussed below.

Consent or Knowledge of Employer. To be counted as working time, an employee's activities must in general be carried on with the employer's knowledge and consent, expressed or implied. Thus, work not requested but "suffered or permitted" is working time when the employer has reason to believe the employee is working, even where the employer has adopted a policy that overtime will not be allowed unless expressly approved by the employer in advance. However, working time does not include time spent by the employee remaining at work beyond the time called for without any knowledge of the employer.

### 3. Nonproductive Time

Generally. Time spent by employees on vacation or other leave, and while waiting, traveling or sleeping, is nonproductive but may be so related to the job of the employee that it must be counted as working time. The following paragraphs discuss such nonproductive time.

Leave, Illness, Vacations and Holidays. Time spent on leaves of absence for any reason, such as a vacation or a holiday and while away from work because of sickness, is not counted as working time under the overtime compensation law, with or without pay. (The employer could agree otherwise through the employment contract or a collective bargaining agreement.) Therefore, for example, if by the employment contract or by law an employee is entitled to a paid day off for Washington's Birthday, the hours off work for that day are not counted as working time. If, however, the employee elects to work on that day, with the employer's knowledge, the hours worked are counted as working time, but they are not overtime hours unless the maximum number of hours to be eligible for overtime pay has already been worked in that workweek.

Attendance at Meetings and Seminars. Public employees frequently attend conferences, seminars, training programs, lectures and other meetings. Time spent by employees at such meetings is counted as working time unless attendance is not during regular working hours, attendance is voluntary, the meeting is not directly related to the job, and no productive work is performed by the employees during attendance.

Meal Periods. Bona fide meal periods are not usually considered as working time. However, if the employee is required to perform duties for the employer, active or inactive, while eating, the meal period is then working time. A receptionist required to answer the telephone while eating



is an example.

Rest Periods. Rest periods of short duration, running from five to 20 minutes, are common practice in today's working environment. They are counted as working time.

Sleeping Time. In certain cases sleeping time must be counted as working time. For instance, if an employee is required to be on duty (lookouts, firemen and dispatch operators are examples) even though the employee is permitted to sleep or engage in other personal activity when not busy, such time is considered to be working time. Additionally, if an employee is interrupted during sleep at home by a call to duty or for other job related business, such time is working time. In fact, if the interruptions are such that the employee cannot get at least five hours sleep, the entire time is counted as working time. Where an employee is required to be on duty for more than 24 hours (firemen might be an example), the employee and employer can agree to exclude sleeping time of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can enjoy an uninterrupted sleeping period. If there is no agreement (expressed or implied) in this instance, the eight hours of sleeping time are counted as hours worked.

Employees Residing at Employers' Premises. Employees who reside at their employers' premises permanently or for extended periods are not considered to be working when they



are not on duty or subject to call and have complete freedom to come and go as they please.

Preparatory and Concluding Activities. An employee's "preliminary" or "postliminary" activities are not counted as working time, but "principal activities" are counted. Washing and changing into workclothes primarily for the convenience of the employee are examples of preliminary activities. Caring for tools, conferences with outgoing foremen, fueling vehicles and filling out time sheets are examples of principal activities which are counted as working time if those activities are an integral part of the job.

Travel Time. Ordinary travel from home to work and return is not usually counted as working time. However, emergency travel to work, such as when an employee has gone home and is subsequently called back to work, is normally counted. In addition, travel to and from another place for the performance of work different than the employee's usual place of work is usually working time, even if outside regular working hours. The employer can regulate this activity by requiring employees to travel only during regular working hours.

Waiting Time. Waiting time is sometimes considered to be working time, but it depends upon the circumstances of each case. If the employee is asked to wait for the employer's convenience, such as being on call on the employer's premises

or other work place or remaining so close that the employee cannot use the time effectively for his own purposes, he is considered to be working. However, if he is only required to leave work at his home or with the employer where he may be reached, he is not considered to be working.

#### D. Employees Covered by the Wage and Hour Law

Generally. The state minimum wage and overtime law covers, with certain exceptions, individuals who are employed by an employer. Employers are not defined, but clearly include all state and local governments and political subdivisions which are the subject of this handbook. The law lists several categories of employees who are exempt from coverage. In public employment, the primary exemption is for individuals employed "in a bona fide executive, administrative or professional capacity." This and other exemptions are discussed in part E of this chapter. In addition, independent contractors are exempt, since they are not employees (see discussion below and in Chapter 1).

There is a possibility that some public employees are covered by the federal minimum wage and overtime law (FLSA) rather than by the state law. Reference should be made to the discussion at the beginning of this chapter for a description of this situation.

Who Is An "Employee." Under the minimum wage and overtime law, the term "employee" is to be construed in its

broadest sense. As mentioned previously, any doubt as to whether or not an individual is an employee and is covered by the law must be resolved in favor of coverage.

Since independent contractors are not employees, they are not covered by the law. (But, employees of independent contractors might be covered.) The term "independent contractors" is defined and described in Chapter 1. For purposes of the minimum wage and overtime law, the term is to be given a narrow meaning, since the intent of the law is to extend coverage as far as possible. A claimed independent contractor exemption from the law's coverage will be closely scrutinized by the Montana Labor Standards Division, applying the tests set out in the discussion in Chapter 1.

The law defines "employ" to mean to "suffer or permit" to work. This means that an individual otherwise covered by the law will be deemed to be an employee even if the work is not requested by the employer but is done with the expressed or implied consent or knowledge of the employer. However, if an employer has not expressly hired an individual, or allowed him to work under circumstances where an obligation to pay him will not be implied, there is no employer-employee relationship.

## E. Exemptions

### 1. Generally

The minimum wage and overtime law provides for a number of specific exemptions, either from the minimum wage or

overtime compensation provisions, or both. These exemptions are based upon the nature of the duties performed by the individual employee, or upon the nature of the employer's business. Most of these exemptions will not arise in the case of public employees except in the rarest of circumstances, and will therefore not be enumerated here; only those that have application to employees of state and local governments will be discussed.

Time Unit in Applying Exemptions. In determining the applicability of an exemption, the workweek is the unit of time used. See part C of this chapter for a discussion of "workweek." An employee may be exempt in one workweek and not in the next; the employer has the burden of keeping track of exempt and nonexempt work as between workweeks.

## 2. Executive, Administrative and Professional Employees

Generally. The minimum wage and overtime compensation provisions of the law do not apply to employees in a "bona fide executive, administrative, or professional capacity." This exemption is probably the most difficult to apply because of the meaning of those terms under different circumstances. The Commissioner of Labor and Industry has adopted an extensive set of regulations (patterned after the federal regulations) defining and describing these terms for guidance in applying the exemption.

Factors Determining Exemption. An employee's actual

activities determine whether or not he is employed in an exempt executive, administrative or professional capacity, not whether he is well-paid or has a job description or title that implies he is employed in one of the three exempt categories. For example, calling a garbage truck driver a sanitary engineer will not qualify him for the professional exemption, and giving an employee an empty title of assistant manager will not qualify him for the executive exemption. What the employee actually does in practice is what counts.

Executives. The regulations of the Commissioner define an executive as an employee:

- (a) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;
- (b) who customarily and regularly directs the work of two or more employees;
- (c) who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;
- (d) who customarily and regularly exercises discretionary power;
- (e) who does not devote more than 20% of his hours of work in the workweek to activities which are not directly and closely related to the above



activities; and,

- (f) who earns more than \$150 per week, exclusive of board, lodging or other facilities furnished by the employer and who meets the criteria of (a) through (e) above, or who earns more than \$200 per week, exclusive of board, lodging or other facilities, and meets the criteria of (a) and (b) above. (This salary criteria does not apply to employees whose salary is set by statute, as is the case with some public employees.)

All the above criteria must be met in order for the exemption to apply, since they are listed together in the regulations. These criteria are identical to those adopted under the federal FLSA, except as to the salary levels in (f).

As the regulations state, management of the enterprise in which he is employed or of a subdivision thereof must be the primary duty of the employee. As a rule of thumb, an individual's primary duty is management if he spends more than 50% of his time in management. The following are examples of managerial duties: interviewing, selecting and training employees; directing their work; setting and adjusting their pay and hours of work; approving their productivity; handling their complaints; planning their work; and apportioning their work.

The requirement of directing two or more employees is met if two full time employees are supervised, or several part-time employees whose hours worked are equivalent to two



full-time employees.

The criteria that the employee exercise discretionary power is not met by the occasional exercise of discretionary power or by the exercise of mere discretion as to mechanics of performance. Discretion must be exercised on a day-to-day basis, and in matters of policy.

Administrators. The exemptions for "executive" and "administrative" employees are sometimes confused. Each term has its own meaning under the law and regulations. In practice, however, if an employee meets the executive exemption, he will also meet the administrative exemption. However, the opposite is not true, since the administrative exemption is intended to be broader than the executive exemption.

Under the regulations, an administrator is an employee:

- (a) whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer;
- (b) who customarily and regularly exercises discretion and independent judgment;
- (c) who regularly and directly assists an employee employed in an executive or administrative capacity, or who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or who

executes special assignments and tasks under only general supervision;

(d) who does not devote more than 20% of his work hours to nonexempt work; and,

(e) who receives not less than the salaries specified for the executive exemption, with the same limitations.

Whether an employee's work meets the "primary duty" requirement for administrators is governed by the same principles as apply to the "primary duty" requirement for executives. The requirements that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to "white-collar" employees, but "office" work can be either manual or nonmanual in nature. In this context, the term "manual" is used in its regular sense, and means physical exertions as to the use of hands in contrast to mental exertions only.

Administrative activities may include, for example, advising management, planning, negotiating, representing the employer, purchasing, and business research and control. Under federal regulations, which would likely be used to interpret the state law, administrative activities have a special meaning as to academic administrative employees. There, administrative activities denote administration relating to the academic operations and functions in a school.

The extent to which discretion or independent judgment and the duty of making recommendations are involved is one of

the most important elements in determining whether an employee's work is administrative in character. It means the power to make independent choices, free from immediate direction or supervision, involving the setting of precedents and assisting in the determination of policies. It must be distinguished from the use of skill in applying techniques, procedures or specific standards, and decisions relating to matters of little consequence.

There are three classes of employees described in particular in the regulations who may qualify for exemption as administrative employees: (1) executive and administrative assistants, generally found only in larger places of employment; (2) staff employees, such as personnel directors, special subject analysts and experts, and statisticians; and (3) those who perform special assignments, such as organization planners.

Professionals. A professional, under the regulations, is an employee:

- (a) whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning;
- (b) whose work requires the consistent exercise of discretion and judgment in its performance;
- (c) whose work is predominantly intellectual and varied in character;
- (d) who does not devote more than 20% of his time to nonexempt work; and

(e) who, with the exception of employees actually practicing law or medicine, is compensated at the same rates and under the same criteria as an executive (see previous discussion of the executive exemption).

The same principles of the primary duty requirement for executives and administrators also apply to professionals. Additionally, in determining whether an employee is an exempt professional, the work actually performed by the employee controls the determination -- not whether the employee is trained as a professional. For example, a lawyer employed as a clerk is not a professional for purposes of the exemption from coverage for overtime compensation.

Generally speaking, the professions which meet the requirements that the profession requires knowledge of an advanced type customarily acquired by a prolonged course of specialized instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, and various types of physical, chemical and biological sciences. Certain artistic professions may also be exempt, such as music, writing and graphic arts.

Since there are many teachers in public employment in Montana, that category deserves special attention. A "teacher" is not defined in the state-adopted regulations; there are, however, federal regulations which provide guidance. The teacher-professional status may be satisfied if

the employee's primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge. A teacher is engaged in teaching as a primary duty even if a considerable amount of time is also spent in extracurricular activities such as coaching, or acting as adviser in drama, forensics or journalism activities. Having a teaching certificate does not necessarily qualify an employee for exemption as a professional teacher; again, what is actually done on the job is what is important.

#### Trainees as Executives, Administrators and Professionals.

Employees who are training to become, but are not actually performing the duties of, an executive, administrative or professional employee, are not exempt from the overtime compensation law.

### 3. Agricultural Employees

Generally. Special minimum wage provisions apply to "farm workers" under the state minimum wage law; farm workers are exempt entirely from the overtime compensation law. Since there are some farm workers in public employment, these special provisions are discussed briefly below.

Farm Worker Defined. A "farm worker" is any person employed to do any service performed on a farm or ranch. The Montana Supreme Court has held that this definition requires that the work must actually be done at the farm or ranch, and not somewhere else although still for the farm or ranch.



Minimum Wages of Farm Workers. If a farm worker is employed for a calendar year which includes periods requiring working hours in excess of eight hours per day, and other seasonal periods requiring working hours substantially less than eight hours per day, the employer may elect to compensate the employee farm worker under two different options: (1) pay a fixed rate of compensation during the term of employment that works out to the minimum wage (the employer must keep records of the total number of hours worked by the farm worker); or, (2) pay a minimum monthly wage of \$635 per month.

#### 4. Apprentices and Learners

Generally. Apprentices and learners can be exempted from both the minimum wage and overtime compensation requirements of the law for a period not to exceed 30 days of their employment if approval has been obtained from the Montana Commissioner of Labor and Industry in the form of a "learner certificate." In addition, learners under the age of 18 who are employed as farm workers (see definition in part E above) are exempt for a period not to exceed 180 days, provided they are paid 50% of the minimum wage; no learner certificate is necessary to qualify for this exemption.

Learner Defined. Under the regulations a "learner" is a worker whose total experience in an authorized learner occupation within the last three years is less than the period of time allowed as a learning period for that occupation according to the learner certificate issued by the



Commissioner of Labor and Industry.

Learner Certificate -- Appendix C. The employer must apply for and receive a learner certificate before a learner is exempt under the first learner exemption discussed above. Application is made to the Department of Labor and Industry, Labor Standards Division, on a form provided by the Division. See Appendix C for an example of this form. A separate application is required for each learner. The employer is required to report certain information and to meet certain criteria before a certificate will be approved by the Commissioner. Learner certificates require, among other things, that the learner be paid at least 85% of the minimum wage, and are good for only 30 days.

#### 5. Handicapped Employees

Generally. Handicapped workers engaged in work which is incidental to training or evaluation programs, or whose earning capacity is so severely impaired that they are unable to engage in competitive employment, are also exempt from the minimum wage and overtime law. Although the statutes do not provide for certificates of approval in this case, the regulations of the Commissioner require that a special "certificate of handicapped workers" must be obtained.

Handicapped Worker Defined. A handicapped worker is an individual whose earning capacity for the work he is to perform is impaired by age, physical or mental deficiency, or

injury. A "handicapped trainee" is a handicapped worker who is receiving or is scheduled to receive on-the-job training under a vocational rehabilitation program.

Handicapped Worker Certificates. Applications for a handicapped worker certificate must be approved by either the Montana Department of Social and Rehabilitation Services, by the state institution caring for the handicapped person, or by the Commissioner of Labor and Industry.

#### 6. Miscellaneous Exemptions.

Generally. Other exemptions from the minimum wage and overtime compensation law which may be applicable to public employees are discussed briefly below.

Student Learner. Students participating in a distributive education program established under the auspices of an accredited educational agency are exempt. Such students are called "student learners." A "student learner" is an individual who is attending an accredited school, college or university and is employed on a part-time basis, pursuant to a bona fide vocational program authorized and approved by the Montana State Office of the Superintendent of Public Instruction. A special student-learner certificate must be obtained from the Montana Department of Labor and Industry to qualify for this exemption.

Employees of Sheriffs' Departments, Municipal and County

Governments, Health Care Facilities; Firefighters. A special overtime pay exemption was added to the law in 1981 for employees (including the sheriff and undersheriffs) of a sheriff's department who are working under an established work period in lieu of a workweek. A separate law authorizes a sheriff's department to establish a work period other than a workweek for determining when an employee may be paid overtime. In 1983, additional overtime pay exemptions were added for firefighters, municipal and county employees, and employees of hospitals and other establishments primarily engaged in the care of the sick, disabled, aged, or mentally ill, where the employees have consented to different work periods by collective bargaining or by mutual agreement with the employer. Even with such agreements, however, municipal and county employees must still be paid overtime pay at one and one-half times the hourly wage rate for employment in excess of forty hours in a seven-day, forty-hour work period; and health care facility employees must be paid overtime pay at one and one-half times the hourly wage rate for employment in excess of eight hours per day or eighty hours in a fourteen-day period.

F. Record Keeping Requirements Under Minimum  
Wage and Hour Laws

1. Generally

The Commissioner of Labor and Industry has adopted regulations requiring that employers maintain certain records to ensure compliance with the minimum wage and overtime

compensation law in Montana. The following describes the requirements of those regulations.

## 2. General Requirements

Form of Records. The regulations do not require that records be kept in any particular form; that is left to the employer. However, all employers who are covered by the minimum wage and overtime compensation laws, including public employers, must maintain records containing the information and data required by the regulations discussed below.

Payroll Records. Employers must maintain and preserve payroll or other records containing the following information and data for each employee covered by the minimum wage and overtime compensation laws:

- (a) Name in full, and on the same record, the employee's identifying symbol or number if used in place of the employee's name on any time, work or payroll records. The name must be the same as that used for Social Security record purposes;
- (b) Home address, including zip code;
- (c) Date of birth;
- (d) Sex and occupation in which employed. The sex may be indicated by use of the prefixes Mr., Mrs., or Miss;
- (e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or is employed by an employer all of whose

workers have a workweek beginning on the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force will suffice;

- (f) Regular hourly rate of pay, and length of pay period;
- (g) Hours worked each workday, and total hours worked each workweek;
- (h) Total daily or weekly straight-time earnings or wages;
- (i) Total weekly overtime compensation;
- (j) Total additions to and deductions from wages paid each pay period, and the dates, amounts and nature of the items which make up the total additions and deductions;
- (k) Total wages paid each pay period;
- (l) Date of payment and the pay period covered by payment.

Payroll Records of Bona Fide Executive, Administrative and Professional Employees. For employees employed in a bona fide executive, administrative or professional capacity (see part E of this chapter), the employer must keep all the records listed above, except those listed in (f) through (i); the employer must also keep records showing the basis on which wages are paid (such as \$500/month, \$20,000/year, etc.). If there is some doubt whether or not a particular employee is employed in a bona fide executive, administrative or pro-



fessional capacity, the employer should keep all the records listed in (f) through (i) as well.

Preservation of Records; Inspection. All payroll records required to be kept as listed above must be preserved for at least three years; the Labor Standards Division recommends that they be kept for at least eight years. In addition, collective bargaining agreements, individual contracts, basic employment and earning records, wage rate tables, worktime schedules and other similar records must be preserved for three years. These records must be kept at the place of employment or at a central record keeping office, and made accessible for inspection by the Labor Standards Division.

Records of Board, Lodging or Other Facilities. Employers who make deductions from wages for board, lodging or other facilities (see the discussion of allowed deductions for board, lodging or other facilities in part B of this chapter) must maintain and preserve records substantiating the cost to the employer of furnishing each class of facility. If meals are furnished, detailed records must be kept showing the type of meals, cost of meals, dates meals were furnished, total cost to each employee for the meals furnished each workweek, and the signature of the employee indicating the meal was actually consumed by the employee.

Records of Learners, Apprentices, Student Learners and Handicapped Workers. In addition to the record keeping



requirements discussed above, a symbol or letter must also be placed before the names on the payroll or pay records indicating that the employee is employed as a learner, apprentice, student or handicapped worker in those cases where the employee is certified as such by the appropriate agency (see discussion under parts E.2 through E.6 of this chapter).

## G. Prevailing Wage Requirements

### 1. Generally

Besides the minimum wage and overtime compensation laws discussed in parts B through F of this chapter, other federal and state laws require the payment of a "prevailing wage" and overtime to certain employees working for contractors or subcontractors on public works projects. Although the federal prevailing wage law itself (Davis-Bacon Act) applies to only federal public buildings or public works projects, its requirements are frequently applied to public buildings or works projects of state or local government where federal funding or funding guarantees are involved under the so-called "related acts." And, even though employees covered by the prevailing wage requirements are not employees of the state agency or local government involved but are employees of a private contractor, the state agency or local government has certain obligations to meet to ensure that the prevailing wage is paid. This section discusses the prevailing wage requirements as they relate to public employers in Montana.

### 2. Federal Prevailing Wage Law

Davis-Bacon Act -- Appendix D. The Davis-Bacon Act, enacted in 1931, applies to most federally-funded projects in excess of \$2,000 for the construction, alteration and/or repair, including painting or decorating, of public buildings or public works, and requires that contractors or subcontractors performing on a covered contract pay their laborers and mechanics on the site of work the wage rates and fringe benefits determined by the Secretary of Labor to be prevailing for corresponding classes of laborers or mechanics engaged in similar work in the locality.

Nearly 60 other laws containing Davis-Bacon labor standards requirements for federally assisted construction have been passed over the years. A list of these federal acts which incorporate the Davis-Bacon Act by reference is included in Appendix D. The purpose of these laws is to preclude the purchasing power of the federal government from depressing local wage conditions through the competitive bidding process on federally-funded or assisted construction projects.

Prevailing Wage Determination Under Davis-Bacon. The determination of prevailing wages is made in accordance with regulations of the U.S. Department of Labor. Under the current regulations, the prevailing wage rate is determined by ascertaining the rates of wages paid to the various classes of laborers or mechanics engaged in similar work in the various types of construction (e.g. building, residential, heavy and highway) in the area in which the work is to be performed. If

the majority of workers in a specific craft and construction type are being paid the same wage, then that wage rate becomes the prevailing wage rate. If a majority of workers are not being paid the same rate, then the rate paid to the largest number of workers is deemed to be prevailing, provided that at least 30 percent of those workers receive the rate. If less than 30 percent of the workers is paid the same rate, then a weighted average is computed for all of the workers by adding all rates and dividing by the number of workers. The result of that formula becomes the prevailing wage.

The "rate of wages paid" includes, in addition to the basic hourly rate, "bona fide" fringe benefits when such payments are made. Bona fide fringe benefits may include contributions for medical care, pensions, certain insurance coverage, vacation and holiday pay and other like benefits, but only where the contractor is not otherwise required to furnish such benefits by law, such as workers' compensation. A contractor may discharge his obligations for payment of wages and fringes by paying in cash, making contributions or incurring costs for "bona fide" fringe benefits, or by a combination of the two methods.

The "area where the work is to be performed" refers to the city, town or other governmental subdivision of the state in which the work is to be performed. The goal is to protect local wage rates. In practice, the Department of Labor generally issues wage determinations for the county in which the

work is to be performed.

Laborers and Mechanics Under Davis-Bacon. "Laborers and mechanics" are workers performing manual or physical duties rather than mental or managerial ones. Under the Davis-Bacon regulations, a worker classified as an apprentice or trainee may be paid less than the prevailing rate on a covered project only if he/she is enrolled in a bona fide apprenticeship or trainee program that is registered with the Apprenticeship Bureau of the Montana Department of Labor and Industry or with the Federal Bureau of Apprenticeship and Training of the U.S. Department of Labor. Otherwise, they must receive the applicable wage rate for the classification of work performed on covered Davis-Bacon projects. Bona fide executive, administrative and professional employees are not subject to the Act's provisions.

Laborers and mechanics employed directly upon the "site of the work" are covered by Davis-Bacon. However, the site of work is not limited to the building itself and the grounds on which it stands. Fabrication plants, batch plants, barrow pits, job headquarters, tool yards, quarries and so forth are part of the site if they are so close to the actual construction site that it is reasonable to include them, and provided they are used exclusively or nearly so for the performance of the contract.

Construction Projects Covered by Davis-Bacon. Under provisions of the related acts noted above, Davis-Bacon pre-

prevailing wage requirements may apply to non-federal construction projects in which the federal government is only indirectly involved. The Federal Aid Highway Act and the National Housing Act are examples of the nearly sixty related statutes (see Appendix D for a list). Because of these laws which by reference incorporate the requirement to apply Davis-Bacon prevailing wages, it is not necessary for the federal government to be undertaking construction which will be used by the federal government itself; some highways, airports, and water pollution control facilities of state or local government, for example, are covered. Nor is it necessary that the federal government pay for the construction -- it might be only guaranteeing commercial bank loans. Today, it can be assumed that most bid contracts involving building, altering or repairing in which the federal government has an interest through ownership, ownership participation, fund guaranty, or funding through a federal grant or assistance program, will probably be covered by Davis-Bacon requirements.

Overtime Pay Requirements. The Contract Work Hours and Safety Standards Act provides that laborers and mechanics, including watchmen or guards, working on federal or federally funded construction contracts in excess of eight hours daily or 40 hours weekly must be paid overtime compensation at a rate of not less than one and one-half times their basic hourly rate of pay.



Effect on State and Local Governments. Generally, state and local governments and political subdivisions carrying out a construction project which involves the federal government are required to ensure only that the advertisement for bids for such construction contain the federal prevailing wage decision that will apply, and that the contract contain certain contract clauses provided in Department of Labor regulations. These clauses, among other things, provide that the contractor will pay prevailing wages, will pay wages not less often than once a week, will submit weekly payrolls to the agency and post the prevailing wage rates required to be paid at the work site.

In addition, if the contract is in excess of \$25,000 the contractor will be required to obtain a bond guaranteeing the payment of prevailing wages (this requirement is the result of another federal law, the Miller Act).

In each case, the state or local government or political subdivision about to embark on a construction project should always check with the appropriate federal agency involved in the project to obtain particulars pertaining to its obligations. In most cases, the federal agency will provide these requirements in written form with other contract materials concerning the project.

### 3. State Prevailing Wage Law

State "Little Davis Bacon Act;" Conflicts with Federal Law. There is also a Montana state law requiring the payment



of prevailing wages (the state prevailing wage law is called the "Little Davis-Bacon Act"). It requires that in any contract let for state, county, municipal, school, or heavy highway construction, services, repair or maintenance work, a provision must be inserted in the bid specifications and the contract requiring the contractor to pay the standard prevailing rate of wages, and what those rates are. (This same law requires the contractor to give preference to the employment of Montana residents -- see part B.3 of Chapter 2.) By its own terms, the state law does not apply in those instances where the prevailing wage is determined pursuant to federal law as described above.

Prevailing Wage Determination Under State Law. Prevailing wages under the state law are determined and set by the Commissioner of Labor and Industry in much the same manner as under the federal law. Wages are determined by locality, county or groups of counties, using existing collective bargaining agreements and other wage-survey information, including the federal Davis-Bacon rates. However, the prevailing wage set by the Commissioner cannot be greater than the wage rate negotiated under such collective bargaining agreements. As under the federal law, fringe benefits for health and welfare, pension contributions and travel allowances may be included in the wage rate if they are also determined to be prevailing in the area in question.

Employees Covered by State Law. The state law is interpreted by the Montana Department of Labor and Industry to apply to all laborers, mechanics and other workers involved in the construction, repair or maintenance of all state, county, municipal and school work; it does not apply to engineering, superintendence, management and office or clerical work.

Projects Covered by State Law. The state prevailing wage law is broader in scope than the federal law as far as its coverage of construction projects is concerned. It not only covers construction, repair and maintenance contracts for buildings, grounds, highways and other property owned by state and local governments, it also covers services provided to state and local governments. The term "services" is not defined. Engineering, superintendence, management, and office or clerical work is expressly exempted.

Public Contracting Agencies Covered by State Law. The statute applies to contracts awarded only by state, county and municipal governments and by school districts. The Department interprets this to mean that it also applies to political subdivisions, such as conservation districts, irrigation districts, hospital districts, etc.

Other Requirements. The state prevailing wage law requires contractors to post a statement of the prevailing wages to be paid employees on the site or work area, as is also required by the federal law. In addition, the public body

letting the contract is required to withhold at least \$1,000 of the contract price until termination of the contract to guarantee that employees will be paid the prevailing wage. There is also a requirement that the legal advisor to the public body approve the contract in writing before it is signed by the appropriate contracting public officer. Finally, if the contract is for more than \$50,000, a notice of acceptance of the bid and the completion date of the project must be sent by the public body involved to the Montana Department of Labor and Industry.

Penalties for Non-compliance. Failure of the contractor to pay the prevailing wage results in forfeiting to the contracting agency \$25 a day for each worker underpaid. This amount comes out of the \$1,000 withheld as discussed above. If the amount withheld is insufficient to cover the forfeiture, the Commissioner of Labor and Industry can sue the contractor for forfeitures due and other penalties as well.

An amendment was made to the law in 1981 which provides that if the prevailing wage rates are not included in a public works contract, the contractor is relieved from paying the prevailing wage. If that happens, then the public contracting agency must pay the prevailing wage.

#### H. Other Wage Protection Laws

##### 1. Generally

The salary and wages of many public employees in Montana

are set by statute. Some of these statutes set minimum wages, others set a mandatory level, and still others establish overtime rates. How wages are to be paid is also governed by several laws, under both the minimum wage and overtime compensation laws and special statutes. Additionally, special wage protection is accorded to restaurant employees, including employees in state-operated restaurants. The wages of employees working for contractors are protected under contractor requirements.

## 2. Special Wage Level Laws

The salaries of many public officers and employees are set by statute. In instances where the level of salaries and wages set by a special statute conflicts with the general state minimum wage and overtime compensation law, the Attorney General has ruled that the special statute is controlling.

## 3. Wage Protection of Restaurant Employees

Generally. Employees in restaurants are given wage protection through bonding. Since the state and local governments operate several restaurants through lessees or contractors, this law deserves mention. Further, these restaurants may be subject to the FLSA if gross annual sales exceed \$300,000.

Bonding Requirements. With certain specified exemptions, anyone who operates a restaurant business (bar and tavern businesses are also covered) must file a bond equal to at

least twice the amount of the projected semi-monthly payroll with the Montana Department of Labor and Industry. It is unlawful for the business to operate without the bond being filed; in fact, it can be closed down for failure to comply with this bonding requirement. Therefore, it is important for the public body involved to ensure that this bonding requirement is met.

#### 4. Contractor's Bond

A contractor engaged in the construction business, except a resident contractor with a net worth of more than \$50,000, must furnish a surety bond in an amount equal to the contractor's average monthly payroll as estimated by the Montana Department of Labor and Industry. The bond must be filed with the Department within one week of the contract or the commencement of work, whichever comes first. The public body for whom a contractor is about to perform construction work should ensure that the bond is filed, since it will be liable for wages and fringe benefits not paid if the bond is not filed.

#### 5. Wage Payment

Payment of Wages Generally. All employers in Montana are required by law to pay their employees in lawful money of the United States or bank checks convertible into cash on demand; scrip, tokens, credit cards, coupons and kickbacks are prohibited. Wages must be paid within 10 days after they are due and payable, except to professional, supervisory or technical



employees who by custom receive their wages at least once monthly.

Deductions. Employers may make reasonable deductions for board, room and other incidentals supplied by them, and for other deductions provided by law, such as for pension plans, taxation and health insurance. Deductions for board, room and other incidentals cannot exceed 40% of the gross wages, and only the actual cost to the employer of the board, room and other incidentals can be deducted. When payments are made to employees the employer must give the employees an itemized statement listing the deductions and their amount.

Payment When Employee Terminated. If an employee is separated from employment for any reason, he must be paid all unpaid wages within three days after separation, except for employees of the state and its political subdivisions who must be paid within 15 days or on the next regular payday, whichever comes first.

Enforcement. The general wage payment statutes described above are enforced through the Montana Department of Labor and Industry. The Department investigates complaints of violations and can institute court actions to collect wages due. Individual employees can also bring court actions to collect wages due; they are entitled to attorney fees if they win.



Payment to State Employees. Pay dates for state employees must be the same for all employees of each state agency employed in the same geographic area. Pay checks (warrants) to state employees must be mailed or distributed within 10 business days following the close of each payroll period.







## CHAPTER 4. HOURS OF EMPLOYMENT

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### A. Generally

Hours of employment refers to the number of hours an employee is required or permitted to work for various purposes. Some laws actually limit the maximum number of hours an employee may be required to work in a certain period. Other laws establish work hours for various types of employment. In addition, the minimum wage and overtime compensation and other laws dictate how wages and overtime compensation are to be computed and paid on the basis of a certain number of hours worked. This chapter describes the requirements.

### B. A Day's Work

#### 1. Montana Constitution

The 8-Hour Day -- Generally. Article XII, Section 2 of the 1972 Montana Constitution provides: "A maximum period of eight hours is a regular day's work in all industries and

employment except agriculture and stock raising. The legislature may change this maximum period to provide for the general welfare." The old (1889) Montana Constitution contained a similar provision, except that the Legislature was permitted only to reduce the maximum, not to raise it.

Interpretation. The eight-hour day provisions of the Montana Constitution have been interpreted and applied somewhat inconsistently in the past, leading to confusion on the part of many public as well as private employers. Today, however, the Montana Supreme Court and the Attorney General have basically settled the problem.

At one time, it was held that the Constitution's eight-hour day provision flatly prohibited any employee from working more than eight hours per day. In 1973, however, in a case involving the state institution at Boulder, the Montana Supreme Court by implication held that the federal minimum wage and overtime compensation law (the federal Fair Labor Standards Act), by providing for overtime compensation, authorized employees to work more than eight hours per day. The Attorney General subsequently ruled that the state overtime compensation law, which now applies to state and local government (see Chapter 3), allows an employer to schedule work days for more than eight hours with the consent of the employee. The result of these rulings is that employees as a general rule may work for more than eight hours in a day if they wish, but an employer cannot require it. However, there are exceptions to this rule, as described later



in this chapter.

## 2. State Statutes

The 8-Hour Day -- Public Employees. There is also a state statute similar to the Constitutional provision, providing that a period of eight hours constitutes a day's work for state, county and municipal government employees and employees of first-class school districts, and for employees of all contractors of those public bodies awarded contracts by bidding. The statute does not apply in the event of an emergency when life or property is in imminent danger. In addition, the statute provides that employees of municipal and county governments may agree to other hours of work per day through collective bargaining or by mutual agreement with the employer. Janitors in courthouses of sixth- and seventh-class counties are expressly excluded. As interpreted by the same Montana Supreme Court case and Attorney General's opinions discussed above, the effect of this statute is to prohibit public employers from requiring covered employees to work more than eight hours per day without the employee's consent. The eight-hour day constitutional and statutory provisions do not require time and one-half pay for work in excess of eight hours in any workday. (But the minimum wage and overtime compensation law requires time and one-half pay for overtime in excess of 40 hours in a workweek, and the employer may also agree to pay time and one-half for more than eight hours in a workday.)

Restaurant Employees. A period of eight hours constitutes a day's work for restaurant, cafe and lunch counter employees, including employees in restaurants operated by public bodies. The hours of work of these employees must be arranged so that they are not on duty for more than a total of eight hours in any 12-hour period, and they must have at least 12 consecutive hours off duty each day. There are exceptions when another employee is sick or when other emergencies arise.

Telephone Operators. Telephone operators may not be employed for more than nine hours in a 24-hour period in cities or towns of more than 3,000 inhabitants.

#### C. The Workweek

Overtime Compensation. Under state law, employees covered by the overtime compensation law must be paid  $1\frac{1}{2}$  times their regular hourly rate for hours worked in excess of 40 hours in any workweek. For a thorough discussion of what employees are covered and how the overtime compensation is to be computed, see Chapter 3.

Firefighters. For firefighters in cities of the first and second class, a workweek is a maximum of 40 hours during a five-day week. Under this law such cities may not schedule their firefighters to work more than 40 hours during a five-day week, without the consent of the firefighters involved. Another law provides that firefighters may not be

required to work more than eight hours in a 24-hour period, except in emergencies; the Attorney General has held that this prohibition may not be waived by the firefighters involved.

Restaurant Employees. Besides having legal protection as to working hours per day, restaurant employees also have weekly protection. By statute they cannot be required to work more than 48 hours in a week.

#### D. Effect on Employment

As discussed previously in this chapter, the constitutional and statutory provisions in Montana governing hours worked per day or week generally have the legal effect of protecting employees from being required to work more than a certain number of hours. That is not to say that an employee, or a group of employees through a collective bargaining agreement, could not agree to work more than the legal maximums. This practice is quite common.

Whether or not the expressed consent of the employee is necessary before he or she can work beyond the legal maximum is a question that has not been decided. It would seem reasonable to interpret the law as not requiring expressed consent, but only acquiescence on the part of the employee. In other words, the employee has the right to refuse to work in excess of the legal maximums; if the employee does not so refuse, it can be presumed the employee consented. However, it is advisable for the employer always to obtain the expressed consent of the employee in these cases, since the

employee could claim that he was coerced to work more than eight hours in a work day, with the employer therefore violating the eight-hour-day laws.

CHAPTER 5.  
EMPLOYEE RIGHTS  
AND BENEFITS





## CHAPTER 5. EMPLOYEE RIGHTS AND BENEFITS

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## A. Generally

By law and administrative policy, public employees are entitled to certain rights and benefits. Commonly called "fringe benefits," they include things like annual leave, paid holidays, insurance coverage, and grievance procedures. Fringe benefits of public employees are described in this chapter. Minimum wage and overtime compensation requirements, maximum hour entitlements, antidiscrimination laws, and rights of terminated employees, are described in other chapters.

## B. Leave

### 1. Sick Leave

Generally. All public employees, with certain minor exceptions, are entitled to sick leave under Montana law. The amount of the leave is based upon a credit hour system, which in turn is based on length and type of service.

Employees Covered. Only elected state, county, and city officials, school teachers, and persons hired as independent contractors or hired under personal service contracts are ex-

cluded from the sick leave benefits provided by state law.

Under various court decisions and opinions of the State Attorney General, it has been ruled that the law even covers employees of hospital districts and fire districts, since they are employees of political subdivisions of local government. In addition, it covers "non-teaching" employees of school districts, the University System, and vocational technical centers, since they are employees of political subdivisions of the state.

The "school teacher" exemption has created the most problems in applying the law. Teachers, whether employed by school districts, the University System, or other schools operated by agents (political subdivisions) of the state are entitled to sick leave as provided by personnel policies of the employer, or by collective bargaining agreements. However, the Attorney General has ruled that benefits for teachers cannot be greater than those provided to employees covered by the law described above.

Sick Leave Defined. By statute, "sick leave" is defined as a leave of absence with pay for a sickness suffered by an employee or his immediate family.

Sick Leave Credits. Full-time public employees covered by the law earn credits for sick leave at the rate of 12 working days each year of service, which is deemed to be equal to 2,080 hours. This means that employees earn sick leave at

the rate of 96 hours per year, or approximately .37 hours per day of employment (.046 hours per hour). Overtime hours and hours worked beyond forty hours per week are not counted. Credits are accumulated from one year to the next, with no maximum.

The credits are earned from the first day of employment, but employees are not entitled to take paid sick leave until they have been continuously employed for 90 days in the same jurisdiction (state, county, or city, or political subdivisions thereof). Sick leave cannot be earned while on a leave-without-pay status.

Part-time, Temporary, and Seasonal Employees. Part-time, temporary, and seasonal employees earn sick leave credits like anyone else, except credits are prorated to part-time employees. They must also work the qualifying 90-day period in order to take paid sick leave.

Payment for Termination; Transfer. Employees who terminate employment for any reason are entitled to be paid a lump-sum payment equal to one-fourth of the pay attributed to the accumulated sick leave, based on the salary or wage of the employee at the time of termination. However, if an employee transfers to the employment of another agency in the same jurisdiction (as from one state agency to another), he is not entitled to be paid the lump-sum; instead, the new employing agency assumes responsibility for the accrued sick leave



credits earned (this is only for sick leave credits earned after July 1, 1971). Once paid a lump-sum, all sick leave credits are lost, even if the employee goes back to work for the same employer.

Abuse of Sick Leave. By law, "abuse" of sick leave is cause for dismissal and forfeiture of the lump-sum payment. However, the term "abuse" is not defined.

Charging Sickness to Annual Leave. It is unlawful for a public employer to charge absence from employment because of sickness to annual leave (see B.2 below) rather than to sick leave, unless the employee consents.

Employer Personnel Sick Leave Policies; Employment Agreements. Each public employer is responsible for administering the sick leave provisions described above, and personnel policies are required to be adopted to do so. This is handled through the Department of Administration for state government, and the chief "administrative officer" of any county, city or political subdivision. Such policies can include provisions to prevent the abuse of sick leave. (See discussion later in this chapter on personnel policies.) Employment and collective bargaining agreements which include sick leave provisions can also be negotiated. However, the Attorney General and the courts have ruled that sick leave benefits provided by law (as well as annual leave benefits -- see below) are mandatory, and not minimums. Therefore, personnel



policies and employment agreements cannot grant employees more benefits than they are entitled to by law; they can only define terms, provide for administration, and make other such determinations.

## 2. Annual Leave

Generally. Public employees earn annual leave credits in much the same manner as sick leave. The leave earned is based on length of service.

Employees Covered. All public employees are covered by the annual leave law except for elected officials, independent contractors and teachers, as under the sick leave law. Annual leave for teachers is provided by administrative policy or employment agreement. Elected officials can take annual leave whenever they want to, but they do not earn credits to be paid out when they vacate their elective positions.

Annual Leave Credits. Annual leave credits for covered public employees are earned as follows:

<u>Year of Employment</u>	<u>Working Days Credit Per Year</u>
1 day through 10 years	15
10 years through 15 years	18
15 years through 20 years	21
20 years +	24

For calculating annual leave credits, 2,080 hours equals one year, and credits are earned only at the end of each pay period. Annual leave can be accumulated to a total not to

exceed twice the maximum number of days earned annually as of the end of the first pay period of the next calendar year, but annual leave time in excess of the maximum is not forfeited by the employee if it is taken within 90 calendar days from the last day of the calendar year in which the excess was accrued.

Annual leave credits are earned from the first day of employment, but employees cannot take paid leave until they have been continuously employed for six calendar months. Annual leave cannot be earned while the employee is on a leave-without-pay status.

Part-time, Temporary and Seasonal Employees. Part-time and seasonal employees also earn annual leave credits, except credits are prorated for part-time employees. Temporary employees earn annual leave only if they are employed longer than six months or are transferred to a permanent position. The six-month qualifying rate also applies to these employees.

Payout for Termination; Transfer. Assuming an employee has worked the six-month qualifying period, he is entitled to be paid for unused annual leave upon termination of employment at his current rate of pay. Termination must be for a "reason not reflecting discredit on himself." An employee may go on an annual leave status when leaving employment, rather than termination immediately and be paid a lump-sum, so as to accumulate more leave credits during the time he is on annual leave. Pay for unused vacation on leaving employment is

considered wages under Montana law and must be paid in a manner identical to other wages.

If an employee transfers to a new agency in the same jurisdiction, no cash payout is allowed. Instead, the new agency picks up liability for credits earned.

Determination of Annual Leave Dates. The times when annual leave can be taken are determined by mutual agreement between the employer and employee. Such determination is often further governed by personnel policies or employment agreements.

Personnel Policies and Employment Agreements. As in the case of sick leave, the public employer can adopt policies governing annual leave, or enter into employment agreements regarding it. Again, however, those policies or agreements cannot conflict with or increase the benefits provided by law, since the benefits are considered to be mandatory and not minimums.

### 3. Holidays

Generally. Public employees are entitled to holidays enumerated by statute. There are different holidays for school purposes.

Holidays for Public Employees Other Than School Employees. The list of legal holidays for public employees, other than school employees (whether teaching or

non-teaching), is as follows:

- (a) Each Sunday;
- (b) New Year's Day, January 1;
- (c) Lincoln's Birthday, February 12;
- (d) Washington's Birthday, the third Monday in February;
- (e) Memorial Day, the last Monday in May;
- (f) Independence Day, July 4;
- (g) Labor Day, the first Monday in September;
- (h) Columbus Day, the second Monday in October;
- (i) Veteran's Day, November 11;
- (j) Thanksgiving Day, the fourth Thursday in November;
- (k) Christmas Day, December 25;
- (l) State General Election Day.

If any of these holidays (except Sunday) fall upon a Sunday, the following Monday is a holiday.

Employees covered by the above are entitled to pay for such holidays (except Sunday). If a full-time employee is scheduled for a day off on a day which is a legal holiday (except Sunday), he is entitled to a day off with pay either on the day preceding the holiday, on another day following the holiday in the same pay period, or as agreed to between the employee and employer; temporary and seasonal employees are not entitled to the same substituted holidays, at least under the statute. Part-time employees receive pay for the holiday on a prorated basis under policies adopted by the employer (the Department of Administration in the case of state part-time employees).

Holidays for School Employees. School employees, whether teaching or nonteaching, are entitled to the following holidays:

- (a) New Year's Day, January 1;
- (b) Memorial Day, last Monday in May;
- (c) Independence Day, July 4;
- (d) Labor Day, first Monday in September;
- (e) Thanksgiving Day, fourth Thursday in November;
- (f) Christmas Day, December 25;
- (g) State and national election days when the school building is used as a polling place and holding school would interfere with the election process at the polling place.

If these holidays fall on a Saturday or Sunday, the preceding Friday or following Monday are not holidays.

Work During Holidays. The Attorney General has ruled that the law doesn't forbid the public employer involved from requiring employees to work on holidays or substitute holidays. However, if an employee is required to work on a holiday, he must be either compensated for the lost holiday or given an opportunity to take a paid day off.

Holidays Falling During Annual Leave. It has also been ruled by the Attorney General that if a holiday falls during an employee's annual leave, that day must be counted as a holiday, and not as annual leave.



#### 4. Military Leave

Leave of Absence of Public Employees Attending Training Camp. By state law, state, city and county employees who are members of the organized militia of the state (National Guard) or who are members of the organized or unorganized reserve corps or military forces of the United States, and who have been employed by the state, city or county for six months or more, must be given leave with pay for a period not to exceed 15 working days in each calendar year to attend regular encampments, training courses and similar training programs of the organized militia or of the military forces of the United States. Such leave may not be charged against annual leave.

This statute has been interpreted by the Attorney General to apply to political subdivisions of state and local government as well, including school districts. The Attorney General has also ruled that the law applies to employees who have fulfilled all mandatory military service and reserve obligations, but who have extended their military service; it does not apply to temporary employees (however, federal law requires that temporary employees who are in federal employment while at a training camp must be given leave without pay for a period not to exceed 15 days.

Military Leave While on Active Duty -- Annual Leave Credits. If a public employee is called to active duty or volunteers for active duty during a war involving the United States or in any other national emergency, his time while on



active duty must be counted as employment for purposes of calculating annual leave credits (see part B.2 above).

## 5. Maternity Leave

Generally. A maternity leave act was enacted in Montana in 1975. It applies to all employers, public and private.

Unlawful Acts of Employer. The maternity leave law, among other things, makes it unlawful for an employer to:

- (a) Terminate a woman's employment because of her pregnancy;
- (b) Refuse to grant a reasonable leave of absence for the pregnancy;
- (c) Deny medical insurance benefits for pregnancy if a medical insurance plan is in effect for other employees;
- (d) Require that an employee take a mandatory leave for an unreasonable length of time.

Leave of Absence. Under the maternity leave law and current regulations of the Commissioner of Labor and Industry (the administration of the law will be transferred to the Human Rights Commission on July 1, 1983), a female employee has the right to take a reasonable leave of absence for pregnancy. For pay purposes, such leave must be treated like any other temporary disability or illness. The determination of what is a reasonable period is made by treating the maternity leave as any other leave for medical reasons. If

the employer requires maternity leave to be taken, the reasonableness of the length of time must be determined on a case by case basis, but the burden is on the employer to prove that a maternity leave for a longer period than that prescribed by the employee's doctor is reasonable. In no case can an employee be required to take leave without pay for a period longer than the period, certified by a doctor, in which the employee is unable to perform her duties. However, the employee and employer can agree to a longer period, either with or without pay.

Reinstatement. An employee on maternity leave is entitled to return to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits.

Enforcement. Enforcement of the maternity leave law is carried out through the Human Rights Commission, as of July 1, 1983. Formerly it was with the Montana Department of Labor and Industry.

#### 6. Jury and Witness Duty

Public employees (other than teachers) who are summoned to jury duty or subpoenaed to serve as a witness may elect to receive their regular salary or take annual leave during jury time. If the employee elects not to take annual leave, however, all juror and witness fees and allowances (except for expenses and mileage) must be remitted to the employer. An

employer may request the court to excuse an employee from jury duty if he is needed for the proper operation of the unit of government affected.

#### 7. Employees Elected or Appointed to Public Office

Public employees (except teachers) who are elected or appointed to a public office in the state, county or city are entitled to a leave of absence of up to 180 days while they are performing public service. They must return to work within 10 days following completion of the service.

#### C. Group Insurance Coverage

Generally. This part describes group insurance coverage available to public employees. Other forms of insurance, such as workers' compensation and employment compensation, are described later in this chapter.

Group Insurance for Public Employees. Upon approval of a two-thirds vote of the officers and employees, each county, city, town and school district, and the Board of Regents, must enter into a group hospitalization, medical, health, long-term disability, accident and/or life insurance contract or plan for the benefit of its officers and employees and their dependents. It is not clear whether this voting procedure and mandatory coverage applies to political subdivisions of counties and cities as well, but judging by court decisions and opinions of the Attorney General in other similar situations, it probably does. It does not apply to political

subdivisions of state government (such as conservation districts), except for school districts.

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State Employees. Group insurance coverage for state employees and elected officials is provided through the Department of Administration, either by contract or by alternative means, such as self-insurance.

Contributions. Once an insurance contract or plan is adopted under the foregoing procedures, the public employer is obligated to contribute at least part of the cost of providing it to each employee who elects to be covered. In the case of state employees (other than members of collective bargaining units) the employer contribution is \$80 per month after June 30, 1982. For employees of school districts and local government, the employer contribution must be at least \$10 per month.

Individual Employee Coverage. An employee may elect not to be covered by any of the insurance plans provided through his public employer; instead, he may pay for separate coverage of his own choosing. In that case, however, the public employer is prohibited from contributing part of the cost.

#### D. Workers' Compensation Insurance

Generally. All public employees in Montana are required to be covered by workers' compensation insurance paid for by the employer. Coverage must also be provided for elected and

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appointed paid public officers. Even most independent contractors must be covered, and their employees. (See Chapter 1 for a definition and discussion of independent contractors). However, independent contractors can be excluded from coverage upon application to and approval by the Workers' Compensation Division. Job related injuries are compensated for by the insurance, and employees are then precluded from suing the employer for injuries.

State Agencies. In the case of employees of state government, coverage must be provided under a plan called compensation plan No. 3, more commonly referred to as the state fund. Under the state fund, state agencies pay an insurance premium which is a percentage of the agencies' payrolls set by the Division of Workers' Compensation. The Division maintains and operates the fund, and pays covered claims out of the fund.

Local Governments and Political Subdivisions. Local governments and political subdivisions may elect to provide coverage under Plan No. 3 or under two other plans, one of which is to cover employees through a private insurance carrier, and the other to "self insure" (pay for workers' compensation claims directly from a reserve fund of the employer itself). The choice of coverage must be approved by the Division.



Other Obligations of Employer. The Workers' Compensation Act and the rules adopted under it by the Division require employers to make certain reports to the Division, and to satisfy other obligations. For example, reports of accidents are required from the employer, and payroll reports from employers who have covered their employees by the state fund.

An employer who contracts with an independent contractor to have work done which is a regular or recurrent part of the functions of the employer is liable for payment of benefits to the employees of the contractor if the contractor has not properly covered his employees. For this reason all employers should make sure their independent contractors are providing workers' compensation insurance for their employees. One effective way to do this is to require the contractor to provide such coverage in the written contract between the public employer and the independent contractor.

The Montana Workers' Compensation Division should be consulted for information on these and any other requirements of the Workers' Compensation Act.

#### E. Unemployment Insurance

Generally. All public employers in Montana are required to provide unemployment insurance for their employees. Only elected public officials and certain students are exempt from coverage; all other public employees are covered. As in the case of Workers' Compensation Insurance, there is no obligation on the employer to provide insurance coverage for an



independent contractors.

Contributions. Employers are required to pay "contributions" to finance unemployment insurance. The payments are made to the Unemployment Insurance Division of state government, and are based upon the wages of the employee. The employment and benefit history of the employer (called "experience rating") also affect the amount of contributions required. Public employers may elect to become liable for benefits in lieu of contributions under certain conditions.

Benefits. Unemployment compensation benefits are paid to employees separated from employment under certain specified criteria. For example, employees terminated for "misconduct" are not entitled to benefits, nor are employees who have voluntarily left work "without good cause."

Other Employer Obligations. Employers are required to maintain certain records and make reports to the Unemployment Insurance Division. Interest and penalty charges are assessed for past-due contributions.

The Montana Unemployment Insurance Division should be consulted for information regarding these and other requirements of the Unemployment Insurance Law.

#### F. Retirement Systems

Generally. There are several retirement systems which

have been created by law in Montana and provide retirement benefits for public employees. All of these systems, with one exception, allow only certain groups of public employees to become members; the one exception is the Public Employees' Retirement System (PERS). One way or the other, virtually all public employees in Montana have an opportunity to join a retirement system; it is required for most state government employees.

Systems in Effect; Members. The following retirement systems are available for Montana public employees:

1. Public Employees' Retirement System (PERS);
2. Teachers' Retirement System;
3. Judges' Retirement System;
4. Highway Patrol Retirement System;
5. Sheriffs' Retirement System;
6. Statewide Police Retirement System;
7. Local Police Retirement System;
8. Firefighters' Retirement System;
9. Volunteer Firefighters' Retirement System;
10. Firefighters' Unified Retirement System.

Since all of these systems are available to only a select group of public employees, with the exception of PERS, and are fairly well known to the employers of those groups, they do not need further discussion here. However, since the PERS is widespread and available to all public employees not otherwise covered, including employees of local governments and political subdivisions, it is briefly described below.

PERS -- State Employees Covered. With few exceptions, all employees of state government are required to participate in PERS from their first day of employment with the state. Certain groups of employees are exempt from mandatory membership, but individuals in those groups may nevertheless elect to become members.

The principal exempt groups are:

1. Elected officers;
2. Employees who work less than 120 working days in any fiscal year;
3. Employees directly appointed by the Governor;
4. Appointed members of boards who are paid on a per diem basis;
5. Employees who start work with the state after their 60th birthday;
6. Legislative branch employees who work less than six months;
7. Employees whose positions are funded under the federal Comprehensive Employment and Training Act (CETA) (these employees must elect not to become members).

In addition, employees who are members of another retirement system supported wholly or in part by funds of the federal government, any state government or political subdivision, are exempt. Therefore, employees who are covered by one of the other retirement systems listed above are exempt from PERS; however, it is possible to belong to more than one system if

the employee works for more than one public employer. And, credits can be transferred from the teachers' retirement system to PERS, and vice versa.

Independent contractors are also excluded (see Chapter 1 for a discussion of independent contractors), but by agreement with the employer they can be included as members.

PERS -- Local Government and Political Subdivision Employees. Employees of local governments and political subdivisions can be covered by PERS through a contract between the employer and the Public Employees' Retirement Board (the state agency which administers PERS). The legislative body of the employer (such as the county commission, city council, etc.) must adopt a resolution approving the contract, and the employees to be covered must approve it by a majority vote by secret ballot.

An employee of local government or a political subdivision for more than two years may attempt to obtain coverage under PERS on his own initiative as well, by filing a request to be covered with the legislative body of the employer. The normal process to institute PERS coverage is then initiated by the legislative body.

Employees who are covered under an existing local retirement system may come under PERS through a contract with the Board in the same manner. However, in that case it takes a two-thirds vote of the employees.

Contributions. Both the employee and employer are required to contribute to PERS. The contributions of employees are deducted from their wages or salaries, and these deductions and the amount of the employers' contributions are remitted to the Board on a regular basis. Contributions are based on the salary of the employee.

## G. Social Security and Income Tax Withholding

### 1. Social Security

Generally. Social Security coverage is almost universal in all types of employment. With only limited exceptions, all employers, including public employers, are required to contribute to the Social Security system, and to deduct Social Security taxes from their employees' paychecks if coverage is elected under the Social Security Act. The most important exception to the public employer is for independent contractors (see Chapter 1).

Since the Social Security System is so widely known, it does not need further explanation in this handbook. Questions regarding its administration should be referred to the local Social Security Administration office, or to the Public Employees' Retirement Board of state government for questions involving state employees.

### 2. Income Tax Withholding

Generally. As with Social Security, employers are required to withhold from their employees' wages and salaries



state and federal income taxes. The withholding rates are based on annual gross income projections, and exemption claimed by the employees.

Recently, the abuse by an employee claiming too many exemptions for withholding purposes has become a serious problem in Montana. Not only can the employee be assessed civil and criminal penalties for filing a false exemption claim (\$500.00 civil penalty and a criminal penalty of one year in prison and/or a fine of \$1,000.00), but the employer can be held liable as well if it fails to withhold the proper amount. Individual officers and officials of the employer can be held personally liable for the proper amount. Therefore, an employer should ascertain the accuracy of an employee's exemption claim to the extent possible. Employers are required to notify the Internal Revenue Service if an employee claims to be exempt himself from withholding, or claims more than 14 withholding allowances; the Montana Department of Revenue must be notified if the employee claims more than nine withholding allowances for state income tax purposes.

The local Internal Revenue Service (IRS) office should be consulted for information regarding federal withholding, and the Montana Department of Revenue for state withholding.

#### H. Employee Retirement Income Security Act of 1974 (ERISA)

Generally. The Employee Retirement Income Security Act of 1974 (referred to as ERISA) is a relatively recent law that



may affect some public employers in Montana, depending on the circumstances.

The main thrust of ERISA is the regulation of retirement plans for employees. Additionally, ERISA prescribes federal regulations for every "employee welfare benefit plan" and every "welfare plan" maintained by an employer or by an employee organization (such as a union). Included in such plans are:

1. Medical, surgical or hospital benefits;
2. Sickness, disability, death or vacation benefits;
3. Apprenticeship or other training programs.

Effect of ERISA. The requirements and regulations under ERISA are too detailed and complex to describe completely in this handbook. Basically, if the employees of a public employer are covered by one of the retirement systems mentioned in part F of this chapter, or are covered by a health insurance plan administered through state government, there is little need to worry about ERISA. It is in those cases where the employer, or the employer and employee organization together, are providing other kinds of retirement or health insurance coverage that the requirements of ERISA should be investigated.

Generally, ERISA is designed to protect employees who are participants or beneficiaries of retirement and insurance plans. Among other things, the Act establishes permissible minimum participation requirements, permissible exclusions

from participation, coverage requirements, and "vesting" and contribution standards. And, quite apart from these requirements and standards, the Act also grants some new rights to pension plan participants. The most important of those is probably "the right to know" provision. Essentially, the law gives employees the right to find out how a plan affects them in detail, and its financial status.

The U. S. Department of Labor, which administers parts of ERISA, says that the Act does not do the following:

1. It does not require employers to offer pension plans;
2. It does not guarantee a pension to every worker, but only to workers who have satisfied plan requirements which are consistent with the minimum standards of the law;
3. It does not set specific amounts of money to be paid out as pensions, but it does require that a survivor benefit, if elected, be at least 50% of the retirement benefit;
4. It does not provide that an employee can automatically transfer his pension if he changes jobs.

#### I. Occupational Health and Safety

Generally. Public employers in Montana are exempt from compliance with the federal Occupational Safety and Health Act (OSHA), since the Act exempts state and local governments and

political subdivisions. However, public employers are required to comply with the Montana Safety Act and its requirements, and under the Montana Safety Act the Workers' Compensation Division (which administers the Act) has adopted essentially the same health and safety standards applicable under OSHA. For all intents and purposes then, public employers must comply with OSHA standards, although they are enforced by the Montana Workers' Compensation Division and not the federal government.

Health and Safety Standards. The Montana Safety Act itself requires employers to furnish a place of employment which is safe for employees. Additionally, employers must furnish, use and require the use of safety devices and safeguards to make the place of employment safe. And, whether the employer is the owner or the lessee of the place of employment, it must repair and maintain the place of employment to make it safe.

The health and safety standards promulgated by regulation under OSHA are extensive. Copies can be obtained by consulting the Workers' Compensation Division. They cover nearly anything that might affect the health or safety of the employees in the place of employment, including the following:

1. National Electrical Code requirements (from loose wires to ungrounded equipment);
2. Safety of abrasive wheel machinery;
3. Construction and placement of compressed gas containers;

4. Marking of exits;
5. Maintenance of portable fire extinguishers;
6. Guarding floor and wall openings, platforms and runways;
7. General housekeeping (from unmopped puddles to flammable rubbish piles to trash in hallways);
8. Machinery guards.

Enforcement. The Montana Workers' Compensation Division enforces occupational health and safety standards in Montana. The Division conducts inspections, both on its own initiative and upon complaint of an employee. A report of an inspection is given to the employer with citations of what was wrong. The Division can order an employer to make changes, additions, repairs and improvements as may be needed to make the working conditions safe. It can stop the use of equipment or order closure or cessation of work if necessary. An employer can also be convicted of a misdemeanor for violation of any health or safety standard.

#### J. Collective Bargaining

Generally. A state law enacted in 1973 gave most public employees in Montana the right to organize and to bargain collectively through representatives on questions of wages, hours, fringe benefits and other conditions of employment. Elected officials and certain supervisory employees, management officials, confidential employees and professional employees as defined in the law were not given this right.

The definitions of supervisory employees and management officials are different than under the minimum wage and overtime compensation law (see Chapter 3), but in practice they are nearly the same.

Organization of Public Employees. The Board of Personnel Appeals determines the appropriate bargaining unit for purposes of collective bargaining. Essentially, the common interests of the employees are used as the criteria; in practice, the Board will approve nearly any group of employees as an appropriate unit. After a Board-supervised secret ballot election, the Board certifies the labor organization which will serve as the exclusive representative of the bargaining unit.

Bargaining. By law the Governor, the governing body of a local government or political subdivision, the Commissioner of Higher Education, or their designated representatives, represent the public employer in collective bargaining. In practice, collective bargaining negotiations are usually conducted by representatives.

Both the employer and the employees are required to bargain in "good faith." Failure to do so is an "unfair labor practice" which can be appealed to the Board.

Collective Bargaining Agreements. Any agreement reached between the public employer and an exclusive representative must be



reduced to writing and signed by the parties. In most cases a vote of the members of the bargaining unit will be conducted before the agreement is signed by the labor representative.

An agreement can cover essentially anything relating to wages, hours, fringe benefits and other conditions of employment, as well as a grievance procedure for resolving disputed interpretations of the agreement and complaints of employees (see Personnel Policies and Procedures in part L of this chapter). However, a collective bargaining agreement generally cannot decrease the minimum wages and overtime compensation requirements of the minimum wage and overtime compensation law (see Chapter 4), or increase or decrease annual leave and sick leave benefits (see part B of this chapter).

Unfair Labor Practices. The collective bargaining law makes certain activities of the employer or the union "unfair labor practices" which can be appealed to the Board of Personnel Appeals. The Board can then remedy such practices by order.

It is an unfair labor practice for an employer to:

1. Interfere with, restrain or coerce employees in the exercise of the rights of employees to organize;
2. Dominate, interfere or assist in the formation of administration of any labor organization;
3. Discriminate against employees to encourage or discourage membership in any labor organization.



(this doesn't prohibit an agreement requiring union initiation fees and monthly dues to be deducted from wages);

4. Refuse to bargain collectively.

It is an unfair labor practice for a labor organization to:

1. Restrain or coerce employees in the exercise of the rights of employees to organize, or to interfere with the right of the employer to choose its bargaining representative;
2. Refuse to bargain collectively in good faith;
3. Use agency shop fees for contributions to political candidates or parties at state or local levels.

## K. Political Activity

### 1. Generally

The political activity of state and local government employees is regulated by both federal and state law. The activities prohibited and permitted under each law are different, as described below.

### 2. Federal Law

Employees Covered. The federal law governing political activity of public employees is known as the Hatch Act. The Act was recently liberalized, but it still applies to many employees of state and local government. Under current law, the Hatch Act covers individuals employed by a state or local agency whose principal employment is in connection with an

activity financed in whole or in part by loans or grants from the federal government. The Act does not cover employees who exercise no function in connection with that activity, even though their positions are financed with federal funds (this is unlikely to happen), nor are employees of an educational or research institution, establishment, agency or system. Basically, any public employee whose salary is paid completely or partly from federal funds is covered by the Hatch Act, except employees of school districts and the University System.

Prohibited and Permitted Activities. Public employees covered by the Hatch Act cannot:

- (a) use their official authority to affect the result of an election or nomination to office;
- (b) directly or indirectly coerce other employees to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes;
- (c) be candidates for elective offices.

They are, however, permitted to vote and express their opinions on political subjects and candidates and to be candidates for non-Partisan offices.

### 3. State Law

Employees Covered. The state political activity law, known as the "Little Hatch Act," covers "public employees."

Therefore, it would seem to cover all employees of state or local government or political subdivisions, including employees of school districts and the University System.

Prohibited and Permitted Activities. The state Little Hatch Act prohibits any public employee from soliciting any money, influence, service or other thing of value, or otherwise aiding or promoting any political committee or the nomination or election of any person to public office, while on the job or at his place of employment. The right of a public employee to express his personal political views is expressly permitted.

It should be noted that state law does not prohibit a public employee from being a candidate to an office. In fact, if a public employee (except a teacher) is elected to a public office in city, county or state government, the employee must be granted a leave of absence to serve in that position for a period not to exceed 180 days (see Chapter 5). Of course, the employee could not campaign for office while on the job. And, if covered by the federal Hatch Act, he or she could not be a candidate for a partisan elective office.

As also noted in Chapter 6, the Montana Human Rights Act prohibits discrimination against any employee for his or her political beliefs.

## L. Personnel Policies and Procedures

### 1. Generally

Personnel policies and procedures generally are considered to be the rules and standards which govern the internal management of the employees in an organization. They can be either written or oral, and can be either promulgated unilaterally by the employer, agreed upon by the employer and employee as a part of the contract, or enacted by the Congress, legislature, or governing body. Personnel policies can cover a wide range of subjects including hours of work, dress standards, and procedures for the employee to pursue grievances against the employer. Obviously, policies and procedures can have a significant impact on the rights and benefits of employees. This part describes the authority of an employer to adopt such policies, the effect of personnel policies in certain cases, and grievance procedures that are currently in effect for some public employees.

Authority to Adopt Personnel Policies. All employers have the inherent power to adopt personnel policies. This power comes from the general right of the employer to supervise and manage its employees.

In the case of public employers, the power to adopt personnel rules is usually expressly granted by statute. For example, all department heads in state government are given the power to prescribe rules, consistent with law and rules established by the governor, for the administration of their

departments, including the conduct of their employees. They would have this power without the statute. Many other statutes also grant personnel rulemaking power to other executive officers of public employers, including local governments and political subdivisions. They are too numerous to list here, but can usually be found by reviewing the statutes creating the particular public body in question.

Personnel Powers and Policies of the State Department of Administration. The personnel policy powers of the state Department of Administration deserve special mention. This Department is the administrative arm of state government. It has a wide range of responsibilities relating to internal operations of state government, and in many cases its activities affect local governments and political subdivisions as well. However, its powers over local government in the area of personnel matters is extremely limited.

By statute the Department of Administration is required to develop and issue personnel policies for state government; it does not have power to adopt personnel policies over local governments, except through merit system requirements. The personnel policies adopted by the Department can be found in the Administrative Rules of Montana (ARM) and in the Montana Operations Manual (MOM). They cover such subjects as sick leave, annual leave, leave due to emergencies, military leave, jury duty and witness leave, holidays, compensation time and overtime, decedent's warrants, new employee orientation,



moving and relocation expenses, reductions in force, exit interviews, employee performance appraisal, discipline handling, employee record keeping, grievances, equal employment opportunity, and employee incentive awards.

In most cases these policies must be followed by the state agencies, but the individual agencies can supplement them with further policies that are not in conflict. In other cases (discipline handling and grievances are two notable areas) agencies are not required to follow the Department's policies, but must "adopt rules to implement" them, which has the same effect. In addition, in most instances the policies of the Department are not applicable if they conflict with negotiated labor contracts. (However, it must also be kept in mind that negotiated labor contracts, in turn, generally cannot decrease the minimum wage and overtime standards provided under the minimum wage and overtime compensation law, nor increase or decrease the annual leave and sick leave benefits provided by law -- see Chapter 3 and part J of this chapter.)

The only area where the personnel policies of the Department of Administration may affect local governments and political subdivisions is through the statewide merit system. Actually, the state Merit System Council is legally responsible for issuing policies on the administration of the Merit System, but the Council is part of the Department and its policies are published as a part of the Department's policies in the Administrative Rules of Montana. The State Merit System requirements and policies apply to all covered



employees, whether employed by state or local government, engaged in the administration of grant-in-aid programs under federal law or regulations which require the state or local agency receiving such funds to establish personnel standards on a merit basis. About 20% of the state employees are currently covered under the state merit system. In actual practice, no employees of local governments or political subdivisions are currently covered.

Effect of Personnel Policies; Recent Court Decisions. One would think that an employer could adopt such personnel policies for its employees as it sees fit, but this is not the case. Any policy adopted must conform to all legal requirements. Such requirements include minimum wage and overtime compensation, annual leave, and a number of others that have previously been described in this handbook. They also include equal employment opportunity and anti-discrimination requirements discussed in Chapter 6. It is therefore important before personnel policies are adopted by any employer, including a public employer, that a determination be made that the policies are not contrary to law.

Some recent decisions of the Montana Supreme Court have cast considerable doubt on the legal effect of personnel policies of employers in Montana. In one case the Court held that a private employer could not unilaterally adopt new personnel policies which would automatically become a part of the employment contract. (See Chapter 1 for a discussion of

employment contracts.) Shortly thereafter this same rationale was applied in the case of a public employee (a University System professor). However, the Court has also said that even though new personnel policies are not part of the employment contract with existing employees, they still must be followed (under what is called the "covenant of good faith and fair dealing") by the employer where they give benefits to those employees. Benefits include procedures for an employee to appeal a grievance he may have against the employer.

Under these recent Court decisions, some personnel policies thought to apply to all employees may not apply to employees who were already employed by the employer when the policies were adopted. On the other hand, insofar as such policies grant certain benefits or rights to those employees, they probably will have to be followed anyhow. If they take away rights or benefits previously in existence, they probably cannot be made applicable to existing employees.

The full impact of these recent Supreme Court decisions is yet to be realized. The best advice that can be given at the time of publication of this handbook is this: if a public employer has adopted personnel policies which give any rights or benefits to employees, they must be followed; if new policies are adopted which lessen or eliminate any rights or benefits previously in effect for employees, they may not be applicable to employees hired before the time of adoption.

## 2. Grievance Procedures

Generally. Grievance procedures are uniform procedures which have been established for an employee to appeal a complaint he has against the employer. Procedures can differ widely. They are either established by the employer by its own action, or by employment agreement. In many cases they are established through collective bargaining agreements. They may cover almost any kind of complaint, or deal with only one specific type of grievance.

Grievances of State Employees. There are several grievance procedures available to state employees, some established by law and others by administrative policy. Only those established by statute or by the Department of Administration are described below.

By law, all state employees who are classified under the comprehensive job classification and pay plan of state government may appeal grievances concerning their classifications. Appeals under this system are conducted according to rules adopted by the Board of Personnel Appeals. Under the rules, job classification appeals, if pursued through all the prescribed steps, would ultimately be heard by the Board.

Employees of the Department of Highways and the Department of Fish, Wildlife and Parks are given special grievance procedure rights by statute. Any dissatisfaction of these employees concerning a "serious matter" of their

employment based on working conditions, supervision or the result of administrative action, except those arising from the operation of the statewide classification plan, can be appealed to the Board of Personnel Appeals after the internal grievance procedures of the applicable Department have been utilized. Grievance appeals in these instances are also conducted according to rules adopted by the Board.

The state Department of Administration by administrative rule has adopted grievance procedures for all other departments. Although these procedures are not mandatory, each department is required to adopt rules to implement them, which has the effect of being mandatory. Employees may appeal grievances concerning working conditions, supervision and administrative action under these procedures through internal steps in their own department; there is no appeal to the Board of Personnel Appeals.

Grievances of Local Government Employees. There are no grievance procedures established by statute for employees of local governments or political subdivisions. Some local governments, however, have adopted administrative policies concerning grievances. Grievance procedures are also provided in some collective bargaining agreements.

Grievance Procedures in Collective Bargaining Agreements. Negotiated labor contracts commonly contain provisions on grievance procedures. In some instances these provisions must be followed rather than the procedures available under statute.

or administrative policy; in other cases the employees may utilize either one, but not both.

Court Review of Administrative Grievance Procedure Decisions. Decisions of the Board of Personnel Appeals under the grievance procedures for state employees described above may be appealed to state district court. The Montana Supreme Court has ruled that a final decision of an agency under the grievance procedures promulgated by the Department of Administration cannot be appealed to court. However, there is a difference between appealing a case to court and filing a direct court action. Thus, the Supreme Court also has held that it is possible for a state employee to sue his employer directly in those cases where there is no appeal. Ordinarily, however, grievance procedures set up by statute must first be exhausted.





**CHAPTER 6.  
DISCRIMINATION  
IN EMPLOYMENT**



## CHAPTER 6. DISCRIMINATION IN EMPLOYMENT

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### A. Federal and State Laws

#### 1. Generally

In the last three or so decades, several laws have been enacted at both national and state levels regulating discrimination in employment. This area of law is also commonly referred to as "equal employment opportunity." Given the breadth of the law regulating employment discrimination, it is impossible to describe completely all the legal requirements of discrimination law in this handbook. Indeed, a complete handbook could be published on this one subject.

The purpose of this chapter is not to acquaint the public

employer with discrimination law, but only to provide a basic

description of the laws involved and some of the practical aspects of application of these laws. The reader should refer to Appendix B for a listing of agencies to consult if questions arise, and which have reference material available more thoroughly describing anti-discrimination requirements.

## 2. Federal Laws

Generally. The following paragraphs list and briefly describe the major federal laws which regulate employment discrimination. They are not a complete listing.

Federal Constitution. The Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment have been interpreted by the courts to forbid "invidious" discrimination in government employment, including employment by state and local governments. Protection against discrimination under these clauses is accorded not only to minority races, but to other individuals or groups as well. For example, mandatory leave for pregnant women employees after five months of pregnancy has been held to be unconstitutional. Because of these recent court interpretations of the Constitution of the United States, it has become obvious that many of the statutes prohibiting discrimination are in fact only implementing the Constitution and not creating new law.

Civil Rights Act of 1964. Title VII of the Civil Rights Act of 1964 is the keystone of employment discrimination law.

It prohibits discrimination in all aspects of employment -- from hiring to firing and virtually everything in between -- on the basis of race, color, religion, sex or national origin (commonly called protected classes). The Act created the Equal Employment Opportunity Commission (EEOC), which investigates complaints of employment discrimination and attempts to negotiate settlement in cases in which the Commission finds that discrimination has occurred. Court action can follow if a case is not settled. (There is a state Commission which does the same thing -- see below.)

Presidential Executive Orders. There are several Executive Orders of the President which prohibit discrimination by federal contractors on the basis of race, color, religion, sex, national origin and age. These orders may affect state and local governments when federal funds are involved in some activity; "affirmative action" plans are required under these orders, which are enforced by the Office of Federal Contract Compliance Programs.

Equal Pay Act. The Equal Pay Act is actually an amendment to the Fair Labor Standards Act (the federal minimum wage and overtime compensation law). It requires equal pay for equal work without regard to sex, and is administered and enforced by the Equal Employment Opportunity Commission. Coverage applies to all employees covered by the minimum wage and overtime compensation provisions of the wage and hour law. See Chapter 3. The U. S. Department of Labor takes the po-

sition that the National League of Cities case referred to in Chapter 3 did not invalidate application of the Equal Pay Act to state and local government employees.)

Discrimination in Employment Acts. The Age Discrimination in Employment Act is a federal statute which forbids employers (including state and local governments) to discriminate against individuals between the ages of 40 and 70 on the basis of age. Enforcement is through the Equal Employment Opportunity Commission. Another new federal law, the Age Discrimination Act of 1975, applies to employers who receive federal financial assistance, without regard to any age group.

A federal district court in Montana has ruled that the Age Discrimination in Employment Act is unconstitutional in its application to state and local government employees, on the same reasoning as the National League of Cities case (see Chapter 3); other federal courts have held just the opposite. However, even if the Montana federal court's ruling is eventually confirmed by a higher federal court, a state law also would prohibit age discrimination by public employers (see below).

### 3. State Laws

State Constitution. The Montana Constitution prohibits the state (which would include local governments and political subdivisions) from discriminating against any person "in the



exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." The state Constitution also contains equal protection and due process clauses similar to the federal Constitution. In addition, the state Constitution prohibits requiring a religious or partisan test or qualification of any teacher as a condition of employment.

Montana Human Rights Act. The Montana Human Rights Act (1974) is the state version of the federal Civil Rights Act. In the area of employment, it prohibits discrimination on the basis of the same factors as the federal law (race, color, religion, sex or national origin), and also forbids employment discrimination on the basis of handicap, marital status, age, and in the case of public employees, political beliefs. It applies to all employers in Montana, including public employers. The Act is administered by the Montana Human Rights Commission, which is attached to the Montana Department of Labor and Industry.

Lower courts in Montana have ruled that employees complaining of employment discrimination and seeking monetary damages must go through the complaint procedures of the Human Rights Commission before they can go to court. An amendment to the Act in 1983, however, authorizes direct court action under certain circumstances. Additionally, pursuant to a worksharing agreement, the federal Equal Employment Opportunity Commission defers nearly all investigations of violations of the federal Civil Rights Act to the Montana Human Rights

Commission.

Governmental Code of Fair Practices. The Governmental Code of Fair Practices was enacted one year after the Human Rights Act (in 1975), and is viewed as an extension of the Human Rights Act. It requires state and local government officials and supervisory personnel to recruit, appoint, assign, train, evaluate and promote personnel on the basis of merit and qualification without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin. All public employers are required to adopt written directives to implement this policy. The Code has other nondiscrimination provisions, relating to training programs, employer referrals and placement services. Another part of the Code requires every state or local contract for the construction of public buildings, or for providing other public works or for other goods and services, to contain a clause that all hiring must be on the basis of merit and qualifications, and that there will be no discrimination on the basis of the same factors for recruitment, etc., listed above.

Equal Pay. Montana has a state equivalent to the federal Equal Pay Act. It applies to all employers, and makes it unlawful to pay women less than that paid to men for equivalent service.

Handicapped. A separate state law prohibits the discrimination, in hiring or employment, against any person because of a physical handicap of that person. Essentially, this law duplicates the Human Rights Act and the Code of Fair Practices as they apply to handicapped people, but the enforcement is somewhat different. Under this Act there is no administrative enforcement; however, it does provide for criminal penalties.

Maternity Leave Act. Montana's Maternity Leave Act prohibits discrimination against pregnant employees. Its provisions are explained in Chapter 5.

#### B. Some Prohibited Discriminatory Practices

Generally. The following paragraphs are intended to provide examples of some of the interpretations of the above listed laws that have been made by the courts and the administrative agencies involved. Only the most common examples frequently encountered by public employers are given.

Compensation and Benefits. No discrimination in the compensation or benefits of employees is allowed on the basis of race, color, religion, sex, national origin, age, political beliefs, marital status, or physical or mental handicap. This applies not only to pay, but also to overtime, paid vacations, holiday pay, and so forth. However, compensation can be based on seniority if there is no attempt to use seniority as a way to discriminate.

Recruiting and Hiring. An advertisement or notice of a job cannot indicate a preference that adversely affects member of a protected class unless the preference is a bona fide occupational qualification. For instance, recruiting only college graduates would be suspect (because it might adversely affect minorities), unless it can be shown that a college education is necessary. Age requirements, even if stated as "young" or "student," would also be considered a form of age discrimination. These same principles apply to a hiring decision.

Job Applications and Interviews. Questions relating to race, religion, age, sex, marital status, etc. should be avoided in job applications and interviews, because they are usually irrelevant and show evidence of discrimination.

Mandatory Retirement. The Montana Supreme Court has ruled that the Human Rights Act in effect repealed a mandatory age retirement statute for teachers. If extended to its logical conclusion, this case means that mandatory retirement statutes and policies in Montana are void.

Statistical Discrimination. Even if an employer evidences no obvious discrimination, it might be held to discriminate if certain classes are underrepresented in the workforce of the employer. For example, if on the basis of statistical information it is found that women are underrepresented in any of the positions in the agency, the

finding might be used as evidence that the employer discriminates in its employment practices.





**CHAPTER 7.  
DISCHARGE AND LAYOFF  
FROM EMPLOYMENT**



## CHAPTER 7. DISCHARGE AND LAYOFF FROM EMPLOYMENT

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One of the most difficult aspects in employee-employer relations is the firing or layoff of an employee by the employer. Such action is difficult not only because of the emotions and hardships involved, but also because of the uncertainty that exists over legal requirements that may or may not apply. Employers frequently find themselves embroiled in legal disputes and lawsuits over firings or layoffs they thought were proper and in the best interests of the employer at the time. The purpose of this chapter is to describe the general legal requirements involved in terminating or laying

off an employee. The same principles generally apply for other job actions, such as demotion and suspension.

## A. Discharge

### 1. Generally

Employment Contract. Whenever an employer is contemplating firing an employee, it must keep in mind that an employment contract is involved in all employee-employer relations. The concept of employment contracts is explained in Chapter 1 and should be reviewed, but a few principles of employment contracts deserve repeating.

An employment contract is created when an employee accepts an offer from the employer to carry out certain work. The contract may be written or oral, and consists of the terms and conditions agreed upon between the employee and employer at the time of employment. Some of these terms and conditions may be expressed (explicitly made a part of the contract in writing or discussed at the time) or only implied (terms that aren't explicitly stated but that exist by implication due to necessity or other good reason). Once created, an employment contract is enforceable according to its terms, like any other contract. Neither party can violate the contract without legal liability for breach of that contract, nor can either party change the terms of the contract without the consent of the other.

Employment contracts are, of course, subject to applicable laws that govern the employee-employer

relationship. Various legal requirements may enter the picture; in effect, they are part of the employment contract by law. Examples are minimum wage laws, nondiscrimination laws, employee benefits mandated by law, and others. Most of them are described in this handbook.

Therefore, whenever an employer is contemplating taking some employee job action, such as firing the employee or laying him off, the employment contract must be taken into account along with the legal requirements described in this handbook. The key question to ask is: Is the contemplated job action allowed under the employment contract?

Termination -- At Will Employees. By law in Montana, any employment having no specified term may be terminated at the will of either party. This means that if an employee is not hired with a guarantee that he will be employed for a definite period of time, the employer may fire the employee at any time, for any reason; in fact, there is no requirement to give any reason at all. Such employees are called "at will employees." This law applies to public employees in Montana, as well as private employees. And, since most public employees are not hired with a guaranteed term of employment, most public employees are "at will employees."

But, as might be expected, terminating employees is not as easy as it might seem. Other legal factors come into play. The first and primary one is the employment contract itself.

In addition, many public employers in Montana, particularly state agencies, have adopted personnel policies which require that there be grounds for an employee to be terminated, or, in other words, that the employer must have a good reason. Such reasons are sometimes called "good cause" or simply "cause." As was previously discussed, personnel policies in effect when an employee is hired for a particular position, or adopted later, and that grant employees certain rights, such as grievance hearings, must be followed. This is true even if the personnel policy is not a part of the employment contract.

Besides personnel policies, which may or may not be part of the employment contract, collective bargaining agreements may also enter the picture. Many public employees are covered by these agreements, and these agreements usually contain provisions on such actions as termination, layoff and demotion of employees. These provisions frequently require that specific grounds (or "cause") exist before an employee can be fired. Obviously these provisions must be followed, too, since collective bargaining agreements are employment agreements.

Other factors must also be considered. Particular laws prohibit firing employees for various reasons. They include laws prohibiting discrimination in employment: it is unlawful to fire an employee in Montana for reasons of race, color, age, sex, religion, handicap, political ideas, marital status or national origin. And, it is unlawful to retaliate against an employee (including firing) because he asserts his civil



rights under the nondiscrimination laws. (Discrimination laws are described in Chapter 6.) There are numerous other laws which also prohibit firing or other retaliatory action for other reasons, described in part A in this chapter. All of these prohibitions are actually a part of the employment contract by implication in a legal sense, but are usually thought of separately.

Under recent court decisions, it has been held that an employee cannot be fired if the termination violates "public policy." "Public policy" is defined as "the principles under which freedom of contract and private dealing is restricted for the good of the community." In other words, if a termination is made for what the courts consider unjust or bad faith reasons, the termination will be invalid. An example is when an employee is fired after refusing to commit a criminal act or to file a false report. Similarly, a termination can be invalid if the employer fails to follow its personnel policies in the firing (such as requiring grounds for termination or providing for grievance appeals), even if those policies do not apply to the particular employee because they were not in effect when the employee was hired.

So it can be seen that as a practical matter "terminable at will employees" aren't common. If, however, the employer has no personnel policy in effect that governs termination of employees, there are no provisions in the employment contract requiring reasons to fire employees, and the legal prohibitions on firing employees described in part A in this

chapter do not apply, an employee probably can be fired without reason at any time. But no public employer should rely on this being the case; legal advice should always be sought first.

## 2. Discharge for Cause

Generally. Employment contracts, personnel policies and various laws may prohibit firing an employee except for "cause." For example, the discipline-handling personnel policy of the State Department of Administration (which all state agencies are required to follow and implement by their own personnel policies) requires "just cause" before an employee can be terminated. Additionally, employees hired for a specified term can be terminated only for cause. "Cause" may or may not be defined in each instance. This part discusses the general meaning of the term as developed by the courts, and under the personnel policy of the Department of Administration.

Cause Defined. "Cause" generally means a default in duty on the part of the employee whose natural tendency is to injure the employer's business. Typical reasons which justify the dismissal of an employee for cause are neglect of duty; negligence; incompetence; inefficiency; dishonesty; disobedience of the employer's rules, instructions, or orders; insolence or disrespect; unfaithfulness to the employer's interests; and immoral, disreputable and unbecoming conduct.

Neglect of Duty; Negligence; Incompetence; Inefficiency.

The law implies that an employee by entering into a contract of employment is competent to perform the work undertaken. Ordinary and reasonable skill, care and diligence are required of all employees, but they cannot be required to exercise the highest degree of skillfulness and care.

Disobedience of Employer's Rules, Instructions or Orders.

An employee must obey all reasonable and lawful rules, instructions and orders of the employer. An employee cannot be required to violate a law or regulation or aid in the violation of a law or regulation, such as in filing a false report. Willful or intentional disobedience as a general rule justifies dismissal of the employee. Dismissal is not justified where the rules, instructions or orders are not known to the employee (or where there is no good reason why he should have known about them), or where violations relate to trivial and unimportant matters.

Cause Under Personnel Policy of Department of Administration.

The state Department of Administration has adopted a "discipline handling" policy for implementation by all state agencies. Among other things, the policy prohibits "punitive discipline" against a state employee unless there is "just cause." "Punitive discipline" includes termination of an employee under the policy.

Pursuant to this policy, the requirement of "just cause" is met if the employee violates an established agency standard, legitimate order, policy, or labor agreement, or fails to meet applicable professional standards. To terminate an employee for one or more of these reasons, the employee must have actual knowledge of the existence of the standard, order, and so forth, or at least there must be a reasonable expectation that he would have knowledge of them.

The Department's policy does not apply to local governments and political subdivisions.

### 3. Unlawful Reasons for Discharge

It is illegal to terminate or retaliate against an employee for any of the following reasons:

1. Attachment or garnishment served on the employer against the wages of the employee;
2. Pregnancy of the employee;
3. The filing of a complaint by the employee against the employer charging a violation of the maternity leave law;
4. For the purpose of circumventing the laws granting annual leave and military leave benefits to public employees;
5. Opposition by the employee to any of the discriminatory practices forbidden by the Civil Rights Act and the Montana Human Rights Act, or his filing of a complaint, testifying, providing

assistance, or participating in any manner in an investigation or proceeding under those Acts;

6. Discriminatory reasons prohibited by the Civil Rights Act and the Montana Human Rights Act (see Chapter 6);
7. Participation by the employee in union activities;
8. Filing a complaint against the employer under the FLSA, Workers' Compensation Act, minimum wage and overtime compensation law, etc.;
9. Refusal of the employee to participate in an illegal or immoral act.

#### 4. Termination Procedure

The termination of an employee may require that certain procedures be followed, such as notice and an opportunity for the employee to have a hearing. The employee might also be entitled to appeal his termination through a grievance procedure (all state employees are given this right -- see Chapter 5, Grievance Procedures). Whether or not certain procedures must be followed will depend on the personnel policies of the employer or labor agreements that are in effect at the time. In all cases the employer should check to see if any such policies or agreements are applicable, and follow them to the letter.

Since most public employees can be terminated only for "cause" (see above), it is important that cause be documented.

A termination can be easily reversed on an appeal or by a



court because of the employer's failure adequately to document and prove cause. The best way to do this is to document all circumstances leading up to a termination in writing before the actual termination action is taken. Reprimands and other statements or notices by the employer that an employee has violated a standard, order, policy, etc., should always be given in writing, along with documentation that the employee received them, whenever it is contemplated that termination might result. The old maxim that the employer should leave a "paper trail" has been proven to be accurate.

## 5. Appeals

The employer's personnel policies governing grievance procedures usually determine what appeal rights an employee may have after he is terminated. Collective bargaining agreements may also contain appeal provisions. (See Chapter 5 for a discussion of some of the grievance procedures currently applicable to state government.)

Court action might also be brought by the employee. As a result of a recent Montana Supreme Court decision, there does not seem to be a requirement that the employee appeal his termination through internal grievance procedures first, before initiating court action, although the law on this point remains unsettled. However, this may not be the case in all situations, especially where the grievance appeals rights are set up by statute. Termination of employees of the Department of Highways and the Department of Fish, Wildlife and Parks



might be exceptions, for example, since their grievance appeal rights are established by statute and not by administrative policy. Direct court action will usually be based on breach of contract or wrongful discharge.

#### B. Other Disciplinary Action Against Employees

Disciplinary action other than termination may also be taken against an employee; temporary suspension and reprimand are examples. Whether or not such action is appropriate will of course depend upon the circumstances. These other forms of discipline basically are subject to the same legal requirements that are described above, except that "cause" is not usually required.

A public employer contemplating taking some form of disciplinary action against an employee other than termination should first review all applicable personnel policies and/or collective bargaining agreements. In the case of state employees, the discipline-handling policies of the Department of Administration will apply, unless discipline handling is governed by a collective bargaining agreement.

#### C. Layoffs (Reductions in Force)

Generally. Layoff of employees usually occurs when the employer has insufficient funds to continue employing the employees. Layoffs (also called reductions in force, or RIF for short), are not disciplinary actions against employees, but are actions taken for financial reasons.

Layoff Procedures. There are no statutes specifically governing the layoff of public employees. The usual laws regarding nondiscrimination, retaliation, etc., (see Chapter 6 and part A of this chapter) will apply; i.e., an employee cannot be laid off for discriminatory or other reasons prohibited by the laws previously discussed in this chapter.

Layoff of State Employees. In the case of state employees, certain procedures must be followed in accordance with policies adopted by the Department of Administration (a new policy was adopted in March, 1982 to replace an older policy). The state RIF policy establishes criteria to be applied in determining who will be laid off, procedures for notifying employees affected, and procedures for reinstatement.

#### D. Payment of Wages of Discharged Employees

Under state law, if an employee is terminated for "cause" (see part A in this chapter for a definition of "cause"), he is not entitled to be paid any compensation for any services rendered after the last day of his termination. This law would seem to be a statement of the obvious, but makes it clear that an employee who works after he is legitimately fired is not entitled to be paid for that work.

Another state law requires that all unpaid wages of any employee terminated from employment for cause must be paid immediately upon termination.

#### E. Blacklisting of Discharged Employees

Statement of Reason for Discharge; Blacklisting. A state statute requires the employer, upon demand by a discharged employee, to give the employee a complete statement in writing of the reasons for his discharge. If the employer refuses to furnish the statement, the employer is then prohibited from furnishing any such statement to anyone else, or from "black-listing" in any way the employee, or preventing the discharged employee from getting a job elsewhere.

If an employer blacklists a discharged employee, or in any way prevents or attempts to prevent the employee from being hired, the employer is liable for punitive (money) damages. Blacklisting is also a misdemeanor under the law.



## APPENDICES





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## APPENDIX A

### PUBLIC EMPLOYERS IN MONTANA

Note: This list is probably not exhaustive - - there may be other units of local government not listed.

State Government

All State Agencies

University System

Counties

Municipalities (Incorporated Cities and Towns)

City-County Governments

School Districts

Includes regular school districts, county high school districts, joint districts (intercounty), joint high school districts, consolidated school districts, and community college districts

Special Districts

Conservation districts  
Conservancy districts  
County water and sewer districts  
Forest fire protection districts  
Drainage districts  
Housing authorities  
Irrigation districts  
Public cemetery districts  
Public hospital districts  
Refuse disposal districts  
Regional airport authorities  
Television districts  
Urban transportation districts

Subordinate Agencies

County agencies  
County health units  
County planning districts  
District health units  
Fair districts  
Fire districts  
Herd districts  
Horse herd districts  
Livestock protective districts

Subordinate Agencies, cont.

- Local improvement districts
- Metropolitan sanitary or storm sewer districts
- Mosquito control districts
- Road districts
- Rural improvement districts
- Weed control and weed extermination districts
- Zoning Districts

Municipal Agencies

- City parking commissions
- Municipal airport authorities
- Special improvement districts
- Urban renewal agencies

## APPENDIX B

### ADMINISTERING AGENCIES

Note: Questions relating to the topics covered by this handbook should first be referred to the personnel officer, attorney, or other employment law specialist assigned to the public employer involved. If the questions remain unanswered, then the agencies listed below may be contacted. This list is not comprehensive. In many instances, a subagency or agencies other than those listed may have a role in the administration of a particular law. However, contact with the agency listed usually will lead to the proper authority.

#### CHAPTER 1.

Not applicable. (The Montana Attorney General's Office or the Labor Standards Division, Montana Department of Labor and Industry, may be contacted for questions relating to the general law discussed in this chapter.)

#### CHAPTER 2.

##### Veterans' Preference

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

Federal: U. S. Department of Labor  
Labor-Management Services Administration  
Federal Office Building  
1961 Stout Street  
Denver, Colorado 80294  
(303) 837-5061

##### Disabled Civilians

State: Rehabilitative Services Division  
Department of Social and Rehabilitation  
Services  
111 Sanders  
Helena, Montana 59602  
(406) 449-2590

##### Montana Labor -- Public Works Contracts

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

## Child Labor

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

Federal: U. S. Department of Labor  
Employment Standards Administration  
Federal Office Building  
1961 Stout Street  
Denver, Colorado 80294  
(303) 837-5903

## Nepotism

State: Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

## Equal Employment

(See Chapter 6)

## Miscellaneous

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

## CHAPTER 3.

### Wages and Wage Protection

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

Federal: U. S. Department of Labor  
Employment Standards Administration  
Federal Office Building  
1961 Stout Street  
Denver, Colorado 80294  
(303) 837-5903



CHAPTER 4.

Hours of Employment

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

or

Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

CHAPTER 5.

Leave

State Agencies:

State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

Local Government:

State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

or

Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

Group Insurance

State: State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

or

Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

#### Workers' Compensation

State: Division of Workers' Compensation  
815 Front Street  
Helena, Montana 59620  
(406) 449-2047

#### Unemployment Insurance

State: Unemployment Insurance Division  
Capitol Station  
Helena, Montana 59620  
(406) 449-2723

#### Retirement Systems

State: Public Employees' Retirement Division  
Department of Administration  
1712 Ninth Avenue  
Helena, Montana 59620  
(406) 449-3154

#### Social Security and Income Tax Withholding

State: Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-2032

Federal: Local or Regional Social Security or Internal Revenue Service Office

#### ERISA

Federal: Pension Benefit Guaranty Corporation  
2020 K Street, NW  
Washington, D.C. 20006  
(202) 254-4817

or

U. S. Department of Labor  
Labor-Management Services Administration  
Federal Office Building  
1961 Stout Street  
Denver, Colorado 80294  
(303) 837-5061

## OSHA

State: Division of Workers' Compensation  
815 Front Street  
Helena, Montana 59620  
(406) 449-2047

Federal: U. S. Department of Labor  
Occupational Safety and Health Adminis-  
tration  
Federal Office Building  
1961 Stout Street  
Denver, Colorado 80294  
(303) 837-3883

## Collective Bargaining

### State (Negotiations):

State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

### State (Appeals and Arbitration):

Personnel Appeals Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

## Political Activity

State: Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

Federal: U. S. Civil Service Commission  
1900 E Street, NW  
Washington, D. C. 20415  
(202) 655-4000

## Personnel Policies

State: State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

or

Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

## CHAPTER 6.

### Civil Rights

State: Human Rights Division  
Capitol Station  
Helena, Montana 59620  
(406) 449-2884

Federal: Equal Employment Opportunity Commission  
2401 E Street, NW  
Washington, D. C. 20506  
(202) 634-7040

### Equal Pay

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

Federal: U. S. Department of Labor  
Employment Standards Administration  
Federal Office Building  
1961 Stout Street  
Denver, Colorado 80294  
(303) 837-5903

### Discrimination in Employment

#### State (Appeals and Grievances):

Human Rights Division  
Capitol Station  
Helena, Montana 59620  
(406) 449-2884

#### State (Compliance):

State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

Federal: Equal Employment Opportunity Commission  
2401 E Street, NW  
Washington, D. C. 20506  
(202) 634-7040

Maternity Leave

State (Appeals and Grievances):

Human Rights Division  
Capitol Station  
Helena, Montana 59620  
(406) 449-2884

State (Compliance):

Human Rights Division  
Capitol Station  
Helena, Montana 59620  
(406) 449-2884

CHAPTER 7.

Discharge and Layoff

State Agencies:

State Personnel Division  
Department of Administration  
Sam W. Mitchell Building  
Helena, Montana 59620  
(406) 449-3871

or

Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

Local Governments:

Attorney General's Office  
Capitol Station  
Helena, Montana 59620  
(406) 449-2026

Payment of Wages

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600

## Blacklisting

State: Labor Standards Division  
Montana Department of Labor and Industry  
Capitol Station  
Helena, Montana 59620  
(406) 449-5600



APPENDIX C

FORMS

Note: The following forms can be obtained from the Montana Labor Standards Division, Capitol Station, Helena, Montana 59620 (406) 449-5600.

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MONTANA DEPARTMENT OF LABOR & INDUSTRY  
Wage & Hour Section  
Labor Standards Division  
Capitol Station  
Helena, Montana 59620

Application For A Certificate To Employ A Learner At  
Subminimum Wages

1. Name & address including zip code of establishment making application  Phone #		3a. Name & address of Learner  Phone # b. Date of Birth (Month, Day, Year)	
2. Type of Business & Products manufactured, sold, or services rendered		4. Have you ever been employed as a learner? If so, what occupation?	
5. Proposed beginning date of employment (month, day, year)		16. Title of learner occupation	
Has an order been placed for experienced workers at Employment Security Office within last 15 days?		17. No. of employees in this establishment	
7. Are experienced workers available for these jobs?		18. No. of experienced employees in learner occupation	
8. Do any abnormal labor conditions exist in plant (strikes, lock outs, etc.)		19. Minimum hourly wage rate of experienced workers in Item 18 for last payroll period	
9. Has employer ever been found in violation of Wage and Hour Laws?		20. Special Minimum Wage(s) to be paid Learner (if a progressive wage schedule is proposed, enter each rate & specify the period during which it will be paid) must be at least 85% of minimum wage	
10. How many learners have you previously hired each year?		21. Is an age or employment certification on file in this establishment for this learner?	
11. Are learners available?			
12. Will learner be retained at end of training period?			
13. Effective date of certificate		22. Annual Gross sales, exclusive of excise taxes  <div style="text-align: center;">\$</div>	
14. Expiration date of certificate			
15. No. of days of employment training at special minimum wage			

23. Previous work experience of learner listing employees names and address and type of work learner has done.

24. Outline Training On-The-Job (describe briefly the work process in which the learner will be trained and list the types of machines used).

25. Signature of Learner:

I have read the statements made above and ask that the requested certificate authorizing my employment training at special minimum wages and under the conditions stated, be granted by the Commissioner or his authorized representative.

\_\_\_\_\_  
Print or type name

\_\_\_\_\_  
Signature of Learner

\_\_\_\_\_  
Date

26. Certification by Employer authorized representative:

I certify, in applying for this certificate, that all of the foregoing statements are, to be best of my knowledge and belief, true and correct.

\_\_\_\_\_  
Print name of employer

\_\_\_\_\_  
Signature of employer or representative

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

MONTANA DEPARTMENT OF LABOR & INDUSTRY

Labor Standards Division

Capitol Station

Helena, Montana 59620

Application For A Certificate To Employ A Student-Learner

At Subminimum Wages

1. Name & address including zip code, of establishment making application:		3A. Name & Address of Student-Learner	
		B. Date of Birth: (Month, Day, Year)	
2. Type of Business & Products Manufactured sold, or services rendered		4. Name & Address, include zip code, of school in which student-learner enrolled	
5. Proposed Beginning Date of Employment (month, day, year)		17. Title of student-learner occupation:	
6. Proposed Ending date of Employment (month, day, year)		18. No. of employees in this establishment:	
7. Proposed Graduation Date (Month, day, year)		19. No. of experienced employees in student-learner occupation.	
8. Number of weeks in school year		20. Minimum hourly wage rate of experienced workers in Item 19.	
9. No. of school hrs. directly related to employment training		21. Special Minimum Wage(s) to Be Paid Student-Learner (if a progressive wage schedule is proposed enter each rate & specify the period during which it will be paid):	
10. Total Hrs. of school instruction per week.			
11. How is employment training scheduled? (weekly, alternate weeks, etc.)			
12. No. of weeks of employment Training at special minimum wages:			
13. No. hrs. of employment training a week.			
14. Are Federal Vocational Education funds being used?		22. Is an age or employment certification on file in this establishment for this student-learner?	
15. Was this program authorized by State Bd. of Vocational education		23. Annual Gross sales, exclusive of excise Taxes:  \$	
16. If Answer to #15 is No give name of recognized educational body approving this program:			

24. Outline the school instruction directly related to the employment training (list courses, etc.)

25. Outline Training On-The-Job (describe briefly the work process in which the student learner will be trained and list the types of machines used).

26. Signature of Student-Learner:

I have read the statements made above and ask that the requested certificate, authorizing my employment training at special minimum wages and under the conditions stated, be granted by the Commissioner or his authorized representative.

\_\_\_\_\_  
Print or type name

\_\_\_\_\_  
Signature of Student

\_\_\_\_\_  
date

27. Certification by School official:

I certify that the student named herein will be receiving instruction in an accredited school and will be employed pursuant to a bona fide vocational training program, as defined in section 4(a) & (g) of the regulations.

\_\_\_\_\_  
Print name of official

\_\_\_\_\_  
Signature of school official

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

28. Certification by Employer authorized representative:

I certify, in applying for this certificate, that all of the foregoing statements are, to be best of my knowledge and belief, true and correct.

\_\_\_\_\_  
Print name of employer

\_\_\_\_\_  
Signature of employer or representative

\_\_\_\_\_  
Title

\_\_\_\_\_  
date



**STATE OF MONTANA**  
**DEPARTMENT OF LABOR AND INDUSTRY**  
**LABOR STANDARDS DIVISION**  
**CAPITOL STATION**  
**HELENA, MONTANA 59620**

**Application for An Age Certificate**

Do Not Use This Space

Cert. No. \_\_\_\_\_

Date Issued \_\_\_\_\_

Date Returned \_\_\_\_\_

**BE FILLED OUT BY THE MINOR:**

1. Name \_\_\_\_\_ Address \_\_\_\_\_  
(Street) (City)
2. Date of Birth \_\_\_\_\_ Age \_\_\_\_\_ Sex \_\_\_\_\_  
(Month) (Day) (Year)
3. Place of Birth \_\_\_\_\_  
(City) (County) (State)
4. Name of Parents/Legal Guardian \_\_\_\_\_
5. Last School Grade Completed \_\_\_\_\_

**Evidence of age submitted:**

If possible, attach your birth certificate to this application as evidence of age. If it is impossible to obtain a birth certificate, attach your baptismal certificate or other documentary evidence, such as an insurance policy at least one year old, or an old family Bible record, or a passport, or a doctor's statement of age, or parents' affidavit, or school record. This evidence will be returned to you, or your employer, when the certificate is issued.

Date \_\_\_\_\_  
(Signature of Minor Applicant)

**TO BE FILLED OUT BY EMPLOYER:**

I intend to employ the above named minor to work as \_\_\_\_\_  
(Occupation — Give Exact Duties)

in \_\_\_\_\_ at a wage of \$ \_\_\_\_\_ per hour, for \_\_\_\_\_ hours per week.  
(Industry of Employer)

He will be employed \_\_\_\_\_ days per week, from \_\_\_\_\_ A.M. to \_\_\_\_\_ P.M. with \_\_\_\_\_ hours off for lunch or rest period.

Period to be employed (check item that applies);

Full time ☐

Before and after school ☐

during vacation ☐

\_\_\_\_\_  
(Signature of Employer)

Date \_\_\_\_\_

\_\_\_\_\_  
(Address of Employer)

Complete only one application per minor—no duplicate copy necessary.



STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
CONSTRUCTION CONTRACTOR'S WAGE PROTECTION BOND

We, \_\_\_\_\_ (contractor) of \_\_\_\_\_, (business address) as principal, and \_\_\_\_\_ (surety) of \_\_\_\_\_, (business address) individuals/a corporation or corporations incorporated under the laws of the State of \_\_\_\_\_, as surety, are firmly bound and are indebted to the State of Montana in the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) for which payment we bind ourselves and our legal representatives and successors, jointly and severally.

The condition of this obligation is that the principal is engaged in the construction business and is required by the provisions of the Montana Contractor's Bond for Wages and Benefits Act, Section 39-3-701, et. seq., MCA, to furnish a bond on the terms and conditions which are set forth in that Act.

This bond is intended to comply with the requirements of the Montana Contractors' Bond for Wages and Benefits Act, Section 39-3-701, et. seq., MCA, and in accordance with the provisions and requirements of that act, it is expressly provided that:

1. Any employee or former employee of the principal may bring an action on this surety bond in his own name for unpaid wages and fringe benefits.
2. The Commissioner, Department of Labor and Industry, State of Montana, through his authorized agents, or the trustee of any trust maintained for the benefit of the employees of the principal may bring an action on this surety bond on behalf of employees or former employees of the principal.
3. The total aggregate liability of the surety shall be limited to the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).
4. This bond shall be deemed continuous in form and shall remain in full force and effect unless terminated or cancelled in the manner hereinafter provided in this agreement.
5. The State of Montana, acting through the Commissioner, Department of Labor and Industry, or his authorized agents, reserves the right, at any time to require a new bond or a bond of greater amount than this bond or to require another or other surety or sureties be provided whenever the Commissioner or his agents deem it necessary to comply with the provisions of the Montana Contractors' Bond for Wages and Benefits Act, Section 39-3-701, et. seq., MCA, to terminate this bond, except as to any liability already incurred or accrued hereunder, by written notice of such termination to the principal and surety delivered or mailed by certified or registered mail. On expiration of the period designated in such notice, which period shall be not less than 30 days from the date the notice was mailed, this bond shall terminate and be of no further force or effect except as to any liability incurred or accrued prior to such termination.
6. Surety may cancel this bond and be relieved of further liability under the bond by giving 30 days written notice to the Commissioner, Department of Labor and Industry, Labor Standards Division, Capitol Station, Helena, Montana 59620, but such cancellation shall not affect any liability incurred or accrued hereunder prior to the termination of the notice period.

7. In the event the principal and surety, or either of them, is served with notice of any action brought against the principal and/or surety under this bond, written notice of the filing of such action shall be immediately given by principal and/or surety, as each is served with notice of action, to the Commissioner, Department of Labor and Industry, Labor Standards Division, Capitol Station, Helena, Montana 59620.

In witness whereof, the parties have executed this bond this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

PRINCIPAL (CONTRACTOR)

\_\_\_\_\_  
\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public for the  
State of Montana  
My Commission expires \_\_\_\_\_

SURETY

\_\_\_\_\_  
\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public for the  
State of Montana  
My Commission expires \_\_\_\_\_

LSD00:A

STATE OF MONTANA

RESTAURANT, BAR AND TAVERN WAGE PROTECTION FUND BOND

KNOW ALL MEN BY THESE PRESENTS; that we \_\_\_\_\_ (Lessee),  
of \_\_\_\_\_ Located at \_\_\_\_\_  
(Name of Establishment) (Address) (City) (County)

hereinafter called the Principal and \_\_\_\_\_ (Surety or Sureties)  
individuals/ a corporation or corporations licensed under the laws of the State of Montana, hereinafter called

the Surety or Sureties, are held and firmly bound unto the State of Montana in the full and just sum of \_\_\_\_\_  
(\$ \_\_\_\_\_) lawful money of the United States of America to be paid to  
the State of Montana or its assigns as Trustee of the Restaurant, Bar and Tavern Wage Protection Fund, to which payment  
well and truly to be made and done, we bind ourselves, heirs, executors, administrators and successors, jointly, several-  
ly, firmly by these presents.

WHEREAS, the above bonded "Principal" has leased or desires to lease a premise to be used as the place for conduc-  
ting a restaurant, bar or tavern business, where the equipment, appliances and other accessories necessary for the con-  
duct of business therein are owned by other than this "Principal," AND

WHEREAS, it is one of the conditions of entering into said lease that pursuant to statute these presents be executed;

NOW THEREFORE, the condition of this obligation is such that if the above bonded "Principal" as Lessee shall in all  
respects comply with all the laws of the State of Montana under the provisions of the Restaurant, Bar and Tavern Wage  
Protection Act, CHAPTER NO. 155, MONTANA SESSION LAWS 1965, and any and all amendments and supplements  
thereto, then this obligation shall be null and void, otherwise to remain in full force and effect, subject, however, to the  
following conditions:

1. That the Lessee shall at all time keep this bond in full force and effect and any cancellation or revocation of this  
bond or withdrawal of the Surety or Sureties therefrom shall automatically revoke and suspend the certificate issued to the  
Lessee as provided in Section 9 of the Restaurant, Bar and Tavern Wage Protection Act until such time as a new bond of  
like tenure and effect shall have been filed and approved as provided in that Act.
2. That should the above bonded "Principal" as Lessee cease operation of business, for any reason, and is unable  
to pay the wages due and owing the employees then the proceeds of this bond shall be used pursuant to the Restaurant  
Bar and Tavern Wage Protection Act to pay the wages due and owing the employees of the Lessee, and the Surety or Sure-  
ties shall be liable pursuant to this bond for the amount of such wages due and owing.
3. That the Commissioner of Labor and Industry may require a new bond or a bond of a greater amount than this  
bond whenever the Commissioner deems it necessary for the protection of the employees of the Lessee.

(continued)

4. That the Commissioner of Labor and Industry may, after due notice given, discharge the existing Surety or Sureties from further liability and require that another or other Surety or Sureties be provided.

Sealed with our respective seals and dated this \_\_\_\_\_ Day of \_\_\_\_\_, 19\_\_\_\_.

WITNESSES:

PRINCIPAL:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Surety or Sureties:

(SEAL)

By \_\_\_\_\_  
Attorney-in-fact (Seal)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
(Notary Public for Montana)



APPENDIX D

FEDERAL ACTS INCORPORATING DAVIS-BACON ACT BY REFERENCE  
(as of October 5, 1972)

1. The Davis-Bacon Act (secs. 1-7, 46 Stat. 1494, as amended; Pub. L. 74-403, 40 U.S.C. 276a-276a-7).
2. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).
3. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).
4. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86-372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).
5. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).
6. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).
7. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 384(b)(5)).
8. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).
9. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91-230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92-318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.
10. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113(a), as amended), see particularly the amendments in the Federal-Aid Highway Act of 1968 (Pub. L. 90-495, 62 Stat. 815).
11. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).
12. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).
13. Rehabilitation Act of 1973 (sec. 306(b)(5), 87 Stat. 384, 29 U.S.C. 776(b)(5)).
14. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).
15. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).
16. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).
17. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).
18. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).
19. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).
20. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).
21. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).
22. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).
23. Health Professions Education Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2256, 42 U.S.C. 293a(c)(7)).
24. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 364; 42 U.S.C. 296a(b)(5)).
25. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).
26. Safe Drinking Water Act (sec. 2(a), see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j-9(e)).
27. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o-3(b)(1)(H)).
28. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).

29. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

30. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

31. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

32. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c-3).

33. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

34. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).

35. Economic Opportunity Act of 1964 (sec. 607, 79 Stat. 532; 42 U.S.C. 2947).

36. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).

37. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).

38. Older Americans Act of 1965 (sec. 502, Pub. L. 89-73, as amended by sec. 501, Pub. L. 93-29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).

39. Public Works and Economic Development Act of 1965 (sec. 712, 79 Stat. 575 as amended; 42 U.S.C. 3222).

40. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).

41. New Communities Act of 1968 (sec. 410, 82 Stat. 516; 42 U.S.C. 3909).

42. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

43. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

44. Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).

45. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).

46. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

47. Energy Conservation and Production Act (sec. 451(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

48. Solid Waste Disposal Act (sec. 2, 90 Stat. 2828; 42 U.S.C. 6979).

49. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).

50. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).

51. Highway speed ground transportation study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

52. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

53. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281i).

54. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4)).

NOTE.—Repealed Dec. 9, 1969 and labor standards incorporated in sec. 1-1431 of the District of Columbia Code).

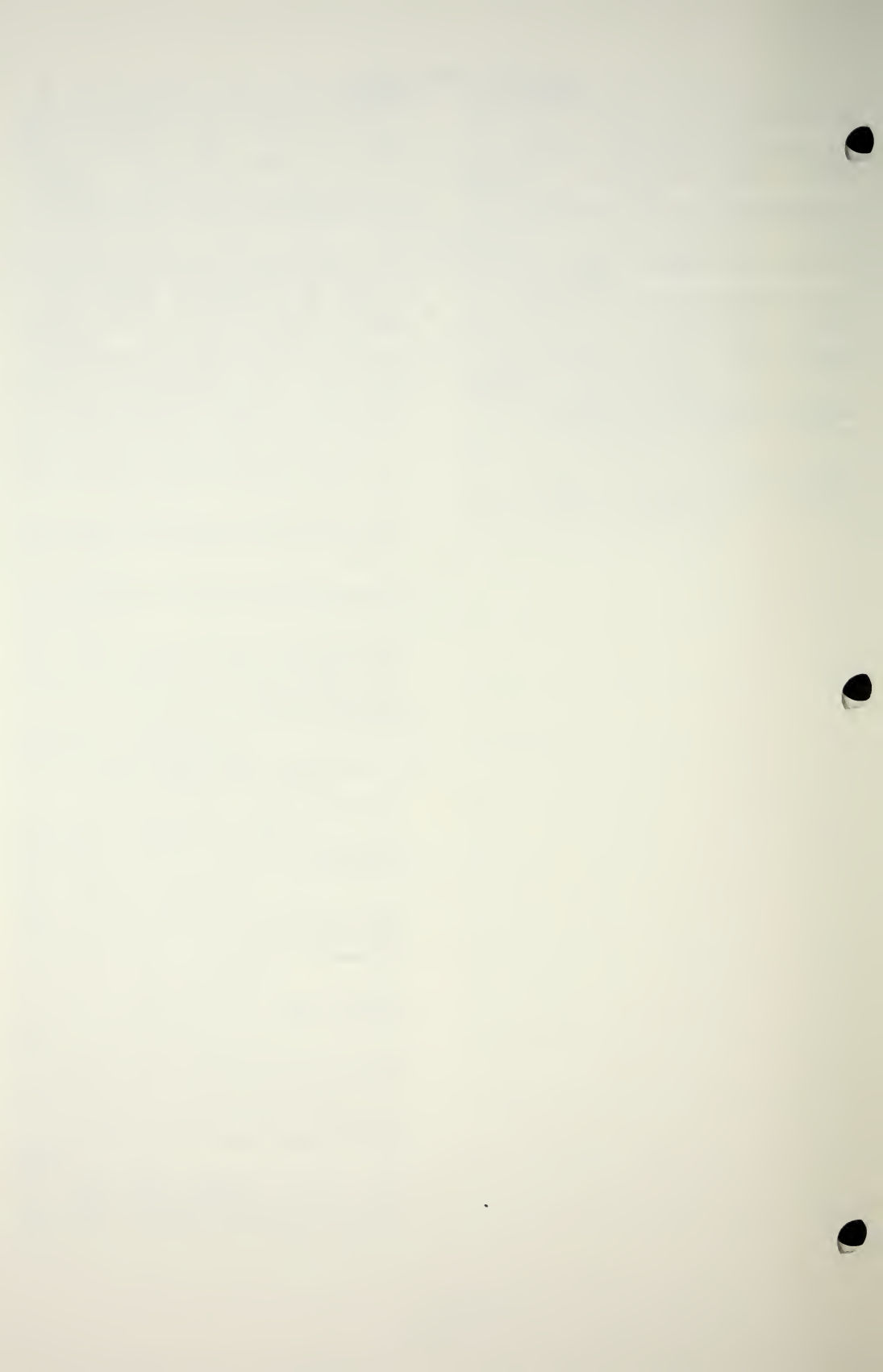
55. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89-694, but not in the United States Code).

56. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87-328) (considered a statute for purposes of the plan but not in the United States Code).

## STATUTES AND RULES

le:

The following is a compilation of laws and rules most often needed in connection with this handbook. Some laws and rules are not included due to space limitations. For example, the state rules relating to minimum wages and overtime compensation are not included. State rules not included may be obtained at any Clerk and Recorder's office, the Montana Secretary of State's office, or at most libraries. They are contained in the Administrative Rules of Montana (ARM). The Labor Standards Division of the Montana Department of Labor and Industry may also be contacted for references to or copies of pertinent laws and rules not contained herein.









# STATUTES AND RULES

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## THE EMPLOYMENT RELATIONSHIP

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39-2-101. Employment defined. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

39-2-102. What belongs to employer. Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully or during or after the expiration of the term of his employment.

39-2-103. Confidential employment. The obligations peculiar to confidential employments are defined in the laws relating to trusts and fiduciary relationships.

39-2-201. Seats for employees. (1) Every employer in any manufacturing, mechanical, or mercantile establishment; laundry, hotel, or restaurant; or other establishment employing any person shall provide suitable seats for all employees and shall permit them to use such seats when they

are not employed in the active duties of their employment.

(2) Any employer who shall fail, neglect, or refuse to provide suitable seats, as provided in this section, or who shall permit or suffer any overseer, superintendent, or other agent of any such employer to violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined for each offense not less than \$50 or more than \$200 or be imprisoned in the county jail for a period of not less than 10 or more than 60 days or both such fine and imprisonment.

39-2-301. Unlawful for employer to require employee to pay cost of medical examination as condition of employment.

(1) It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records of such examination as a condition of employment.

(2) The term "employer", as used in this section, shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company doing business in or operating within the state.

(3) The term "employee", as used in this section, shall mean and include any person who may be permitted, required, or directed by any employer, as defined in subsection (2) of this section, in consideration of direct or indirect gain or profit to engage in any employment.

(4) Any employer violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in any sum not exceeding \$100 for each such offense.

39-2-302. Discharge or layoff of employee because of attachment or garnishment prohibited. No employer shall discharge or lay off an employee because of attachment or garnishment served on the employer against the wages of the employee.

39-2-303. Deception as to character of employment, conditions of work, or existence of labor dispute prohibited. (1) No one doing business in this state shall induce, influence, persuade, or engage workmen to change from one place to another in this state through or by means of deception, misrepresentation, or false advertising concerning the kind or character of the work, the sanitary or other conditions of employment, or as to the existence of a strike or other trouble pending between the employer and the employees at the time of or immediately prior to such engagement. Failure to state in any advertisement, proposal, or contract for the employment of workmen that there is a strike, lockout, or other labor trouble at the place of the proposed employment when in fact such strike, lockout, or other trouble then actually exists at such place shall be deemed a false advertisement and misrepresentation for the purpose of this section.

(2) Any workman influenced, induced, persuaded, or



engaged through or by means of any of the things prohibited by subsection (1) of this section has a right of action for recovery of all damages that he had sustained in consequence of the deception, misrepresentation, or false advertising used to induce him to change his place of employment against anyone directly or indirectly procuring such change, and in addition thereto, he shall recover reasonable attorneys' fees to be fixed by the court and taxed as costs in any judgment recovered.

39-2-304. Lie detector tests prohibited -- exception.

(1) No person, firm, corporation, or other business entity or representative thereof shall require as a condition for employment or continuation of employment any person to take a polygraph test or any form of a mechanical lie detector test. A person who violates this section is guilty of a misdemeanor.

(2) This section shall not apply to public law enforcement agencies.

39-2-305. Employment of aliens not lawfully authorized to accept employment prohibited. (1) No employer may knowingly employ an alien who is not lawfully authorized to accept employment.

(2) A person convicted of violating this section shall be fined no more than \$300.

(3) The department of labor and industry or a person harmed by a violation of this section may sue to enjoin an employer from violating this section and to gain other appropriate relief.

39-2-306. Employment of persons under eighteen as bartenders prohibited. (1) No person under 18 years of age shall be employed as a bartender, waiter, or waitress whose duty is to serve customers purchasing liquors, beer, or wines in any establishment which sells liquors, beer, or wines at retail.

(2) Any retail vendor of liquors, beer, or wines who employs any such person under the age of 18 years is guilty of a misdemeanor.

39-2-401. Duties of gratuitous employee. (1) One who without consideration undertakes to do a service for another is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

(2) One who by his own special request induces another to entrust him with the performance of a service must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

(3) A gratuitous employee who accepts a written power of attorney must act under it so long as it remains in force or until he gives notice to his employer that he will not do so.

39-2-402. Duties of employee for reward. One who for a good consideration agrees to serve another must perform the



service and must use ordinary care and diligence therein so long as he is thus employed.

39-2-403. Duties of employee for his own benefit. One who is employed at his own request to do that which is more for his own advantage than for that of his employer must use great care and diligence therein to protect the interest of the latter.

39-2-404. Employee must obey employer. An employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful or would impose new and unreasonable burdens upon the employee.

39-2-405. Employee must conform to usage. An employee must perform his service in conformity to the usage of the place of performance unless otherwise directed by his employer or unless it is impracticable or manifestly injurious to his employer to do so.

39-2-406. Degree of skill required. (1) An employee is bound to exercise a reasonable degree of skill unless his employer has notice before employing him of his want of skill.

(2) An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

39-2-407. Duty to account. An employee must, on demand, render to his employer as often as may be reasonable just accounts of all his transactions in the course of his service and must, without demand, give prompt notice to his employer of everything which he receives for his account.

39-2-408. Duty of employee regarding items received on account of his employer. An employee who receives anything on account of his employer in any capacity other than that of a mere servant is not bound to deliver it to him until demanded and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employee himself.

39-2-409. Preference to be given to employer's business. An employee who has any business to transact on his own account similar to that entrusted to him by his employer must always give the latter the preference.

39-2-410. Responsibility of employee for substitute. An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

39-2-411. Surviving employee. Where service is to be rendered by two or more persons jointly and one of them dies, the survivor must act alone if the service to be

rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

39-2-501. Termination of employment generally. Every employment is terminated by:

- (1) the expiration of its appointed term;
- (2) the extinction of its subject;
- (3) the death of the employee; or
- (4) his legal incapacity to act as such.

39-2-502. Termination by death or incapacity of employer. (1) Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of:

- (a) the death of the employer; or
- (b) his legal incapacity to contract.

(2) An employee, unless the term of his service has expired or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

39-2-503. Termination at will. An employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter, 28-10-301 through 28-10-303, 28-10-502, 30-11-601 through 30-11-605, and 39-2-302.

39-2-504. Termination by employer for fault. An employment, even for a specified term, may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment or in case of his habitual neglect of his duty or continued incapacity to perform it.

39-2-505. Termination by employee for fault. An employment, even for a specified term, may be terminated by the employee at any time in case of any willful or permanent breach of the obligations of his employer to him as an employee.

39-2-601. Servant defined. A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling and who in such service remains entirely under the control and direction of the latter, who is called his master.

39-2-602. Term of hiring. (1) A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for 1 year; a hiring at a daily rate, for 1 day; a hiring by piecework, for no specified term.

(2) In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month at a monthly rate of reasonable wages, to be paid when the service is performed.

39-2-603. Renewal of hiring. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

39-2-604. Time of service. The entire time of a domestic servant belongs to the master, and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case 10 hours in the day.

39-2-605. Servant to pay over without demand. A servant must deliver to his master without demand, as soon as with reasonable diligence he can find him, everything that he receives for his account, but he is not bound without orders from his master to send anything to him through another person.

39-2-606. When servant may be discharged. A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:

(1) if he is guilty of misconduct in the course of his service or of gross immorality, though unconnected with the same; or

(2) if, being employed about the person of his master or in a confidential position, the master discovers that he has been guilty of misconduct before or after the commencement of his service of such a nature that, if the master had known or contemplated it, he would not have so employed him.

39-2-701. Indemnification of employee. (1) An employer must indemnify his employee, except as prescribed in subsection (2) of this section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such or of his obedience to the directions of the employer, even though unlawful, unless the employee at the time of obeying such directions believed them to be unlawful.

(2) An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed.

(3) An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.

39-2-702. Liability of employee for negligence. An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter, and the employer is liable to him for the value of



such services only as are properly rendered if the service is not gratuitous.

39-2-703. Liability of railway corporation for negligence of fellow servants. (1) Every person or corporation operating a railway or railroad in this state is liable for all damages sustained by any employee of such person or corporation in consequence of the neglect of any other employee thereof or by the mismanagement of any other employee thereof and in consequence of the willful wrongs, whether of commission or omission, of any other employee thereof when such neglect, mismanagement, or wrongs are in any manner connected with the use and operation of any railway or railroad on or about which he is employed. No contract which restricts such liability is legal or binding.

(2) In case of the death of any such employee in consequence of any injury or damage so sustained, the right of action provided by subsection (1) shall survive and may be prosecuted and maintained by his heirs or personal representatives.

(3) Every railway corporation doing business in this state, including electric railway corporations, is liable for damages sustained by an employee thereof within this state, subject to the provisions of 27-1-702, when such damages are caused by the negligence of any train dispatcher, telegraph operator, superintendent, master mechanic, yardmaster, conductor, engineer, motorman, or any other employee who has superintendence of any stationary or hand signal.

(4) No contract of insurance, relief, benefit, or indemnity in case of injury or death or any other contract entered into, either before or after the injury, between the person injured and any of the employers named in subsection (3) is a bar or defense to any cause of action brought under the provisions of this section, except as otherwise provided in the Workers' Compensation Act.

39-2-704. Liability of mining company for negligence of fellow servants. (1) Every company, corporation, or individual operating any mine, smelter, or mill for the refining of ores is liable for damages sustained by any employee thereof within this state, subject to the provisions of 27-1-702, when such damage is caused by the negligence of any superintendent, foreman, shift boss, hoisting or other engineer, or craneman.

(2) No contract of insurance, relief, benefit, or indemnity in case of injury or death or any other contract entered into before the injury between the person injured and any of the employers named in this section is a bar or defense to any cause of action brought under the provisions of this section, except as otherwise provided in the Workers' Compensation Act.

(3) In case of the death of any such employee in consequence of any injury or damages so sustained, the right of action survives and may be prosecuted and maintained by his heirs or personal representatives.

39-2-705. Contract discharging employer liability for negligence void. Any contract or agreement entered into by any person, company, or corporation with its servants or employees whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employees while in the service of such person, company, or corporation, by reason of the negligence of such person, company, or corporation, or the agents or employees thereof, shall be absolutely null and void.

39-2-801. Employee to be furnished on demand with reason for discharge. It is the duty of any person after having discharged any employee from his service, upon demand by such discharged employee, to furnish him in writing a full, succinct, and complete statement of the reason of his discharge and if such person refuses so to do within a reasonable time after such demand, it is unlawful thereafter for such person to furnish any statement of the reason of such discharge to any person or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.

39-2-802. Protection of discharged employees. If any person, after having discharged an employee from his service, prevents or attempts to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, such person is punishable as provided in 39-2-804 and is liable in punitive damages to such discharged person, to be recovered by civil action. No person is prohibited from informing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reason for such discharge.

39-2-803. Blacklisting prohibited. If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing or any other means whatever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person, except as provided for in 39-2-802, such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action, and is also punishable as provided in 39-2-804.

39-2-804. Violation of part a misdemeanor. Every person who violates any of the provisions of this part relating to the protection of discharged employees and the prevention of blacklisting is guilty of a misdemeanor.





## WAGES AND WAGE PROTECTION

### Part 1 -- General Provisions

#### Section

- 39-3-101. Employer to furnish itemized statement of deductions.
- 39-3-102. Compensation of employee dismissed for cause.
- 39-3-103. Compensation of employee leaving for cause.
- 39-3-104. Equal pay for women for equivalent service.

### Part 2 -- Payment of Wages

- 39-3-201. Definitions.
- 39-3-202. Rulemaking power of commissioner.
- 39-3-203. Employer to notify employee on written demand as to rate of wages and date of paydays.
- 39-3-204. Payment of wages generally.
- 39-3-205. Payment of wages when employee separated from employment prior to payday.
- 39-3-206. Penalty for failure to pay wages at times specified in law.
- 39-3-207. Period within which employee may recover penalties.
- 39-3-208. Contracts in violation of part void.
- 39-3-209. Commissioner of labor to investigate violations and institute actions for unpaid wages.
- 39-3-210. Investigative powers of commissioner.
- 39-3-211. Commissioner to take wage assignments.
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- 39-3-601. Short title.
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- 39-3-701. Definitions.  
39-3-702. Rules.  
39-3-703. Contractor to furnish bond for wages and fringe benefits -- bond requirements.  
39-3-704. Exception.  
39-3-705. Suit on bond.  
39-3-706. Liability of person contracting with contractor for failure to require bond.

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39-3-101. Employer to furnish itemized statement of deductions. (1) All employers in this state when making payment to employees for salaries or wages shall, upon making such payment, give to the employee an itemized statement setting forth moneys deducted because of state and federal income taxes, social security, or any other deductions together with the amount of each deduction.

(2) Where no deduction is made in such payment of wages or salaries, the employer shall give to the employee a statement that the payment does not include any such deductions.

39-3-102. Compensation of employee dismissed for cause. An employee dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

39-3-103. Compensation of employee leaving for cause. An employee who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance.

39-3-104. Equal pay for women for equivalent service. (1) It is unlawful for the state or any county, municipal entity, school district, public or private corporation, person, or firm to employ women in any occupation within the state for compensation less than that paid to men for equivalent service or for the same amount or class of work or labor in the same industry, school, establishment, office, or place of employment of any kind or description.

(2) If the state or any county, municipal entity, school district, public or private corporation, person, or firm violates any of the provisions of subsection (1), it is

guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$25 or more than \$500 for each offense.

39-3-201. Definitions. The following are the definitions used for the purpose of this part:

(1) "Commissioner of labor" refers to the director, commissioner, or chief of the labor department as such department is defined by law or any person or persons designated by him for the purpose of this part.

(2) "Employ" means permit or suffer to work.

(3) "Employee" includes any person who works for another for hire.

(4) "Employer" includes any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States.

(5) "Wages" includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly and shall include bonus, piecework, tips, and gratuities of any kind.

39-3-202. Rulemaking power of commissioner. The commissioner is authorized to issue, amend, and enforce rules for the purpose of carrying out the provisions of this part.

39-3-203. Employer to notify employee on written demand as to rate of wages and date of paydays. (1) Each employer or an authorized representative of the employer shall, on written demand, prior to the commencing of work, notify each employee as to the rate of wages to be paid, whether by the hour, day, week, month, or year, and date of paydays. Such notification must be in writing to each employee or by posting of notice in a conspicuous place.

(2) The provisions of this section do not apply to an employer who has entered into a signed collective bargaining agreement, when such agreement contains conditions of employment, wages to be received, and hours to be worked, or to employers engaged in agriculture or stockraising; provided, however, such employers shall comply with the provisions of 39-3-205.

39-3-204. Payment of wages generally. (1) Every employer of labor in the state of Montana shall pay to each employee the wages earned by such employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value thereof, and no person for whom labor has been performed may withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the same are due and payable. However, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever such deductions are a part of the conditions of employment, or other deductions provided for by law.

(2) If at such time of payment of wages any employee

is absent from the regular place of labor, he is entitled to such payment at any time thereafter.

(3) Provisions of this section do not apply to any professional, supervisory, or technical employee who by custom receives his wages earned at least once monthly.

39-3-205. Payment of wages when employee separated from employment prior to payday. (1) Except as provided in subsection (2), whenever any employee is separated from the employ of any employer, all the unpaid wages of such employee shall become due and payable within 3 days, except for employees of the state of Montana and its political subdivisions who would be paid on the next regular payday for the pay period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee. However, where an employer's payroll checks originate at an office outside the state, the time provided herein for payment of wages shall be extended for 3 additional days.

(2) When an employee is separated for cause from employment by the employer, all the unpaid wages of the employee shall become due and payable immediately upon such separation.

39-3-206. Penalty for failure to pay wages at times specified in law. Any employer, as such employer is defined in this part, who fails to pay any of his employees as provided in this part or violates any other provision of this part shall be guilty of a misdemeanor. A penalty shall also be assessed against and paid by such employer and become due such employee as follows: a sum equivalent to the fixed amount of 5% of the wages due and unpaid shall be assessed for each day, except Sundays and legal holidays, upon which such failure continues after the day upon which such wages were due, except that such failure shall not be deemed to continue more than 20 days after the date such wages were due.

39-3-207. Period within which employee may recover penalties. Any employee may recover all such penalties as are provided for the violation of 39-3-206 which have accrued to him at any time within 18 months succeeding such default or delay in the payment of such wages.

39-3-208. Contracts in violation of part void. Any contract or agreement made between any person, partnership, or corporation and any party in his or its employ the provisions of which violate, evade, or circumvent this part is unlawful and void, but such employee may sue to recover his wages earned, together with the 5% penalty specified in 39-3-206 or separately to recover the penalty if the wages have been paid.

39-3-209. Commissioner of labor to investigate violations and institute actions for unpaid wages. It shall



be the duty of the commissioner of labor to inquire diligently for any violations of this part and to institute actions for the collection of unpaid wages and for the penalties provided for herein in such cases as he may deem proper and to enforce generally the provisions of this part.

39-3-210. Investigative powers of commissioner. (1) The commissioner or his authorized representatives are empowered to enter and inspect such places, question such employees, and investigate such facts, conditions, or matters which they may consider appropriate to determine whether any person has violated any provision of this part or any rule issued hereunder or which may aid in the enforcement of the provisions of this part.

(2) The commissioner or his authorized representatives may administer oaths and examine witnesses under oath; issue subpoenas; compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony; and take depositions and affidavits in any proceeding before the commissioner.

39-3-211. Commissioner to take wage assignments. Whenever the commissioner determines that one or more employees have claims for unpaid wages, he shall, upon the written request of the employee, take an assignment of the claim in trust for such employee and may maintain any proceeding appropriate to enforce the claim, including liquidated damages pursuant to this part. With the written consent of the assignor, the commissioner may settle or adjust any claim assigned pursuant to this section.

39-3-212. Court enforcement of commissioner's determination. A determination by the commissioner of labor and industry made after a hearing as provided for in parts 2 and 4 of this chapter may be enforced by application by the commissioner to a district court for an order or judgment enforcing the determination if the time provided to initiate judicial review by the employer has passed. The commissioner shall apply to the district court where the employer has its principal place of business or in the first judicial district of the state. A proceeding under this section is not a review of the validity of the commissioner's determination.

39-3-213. Disposition of wages. (1) The commissioner of labor and industry shall deposit wages collected by him under parts 2 and 4 of this chapter into the agency fund and shall attempt to make payment of wages to the entitled person. Wages deposited into the agency fund are not interest bearing. The payment of wages collected may be made by means of state warrants.

(2) Warrants issued pursuant to subsection (1) which remain unclaimed for more than 1 year from the date of issuance shall be returned to the state auditor for cancellation in accordance with 17-8-303.

39-3-214. Court costs and attorneys' fees. (1)

Whenever it is necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due as provided for by this part, a resulting judgment must include a reasonable attorney's fee in favor of the successful party, to be taxed as part of the costs in the case.

(2) Any judgment for the plaintiff in a proceeding pursuant to this part must include all costs reasonably incurred in connection with the proceeding, including attorneys' fees.

(3) If the proceeding is maintained by the commissioner, no court costs or fees are required of him nor is he required to furnish any bond or other security that might otherwise be required in connection with any phase of the proceeding.

39-3-215. Authority of county attorney. Nothing herein contained shall be construed to limit the authority of the county attorney of any county of the state to prosecute actions, both civil and criminal, for such violations of this part as may come to his knowledge or to enforce the provisions hereof independently and without specific direction of the commissioner of labor.

39-3-401. Declaration of policy. It is declared to be the policy of this part to:

(1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency, and general well-being;

(2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency, and general well-being of workers against the unfair competition of wage and hour standards which do not provide such adequate standards of living; and

(3) sustain purchasing power and increase employment opportunities.

39-3-402. Definitions. As used in this part the following definitions apply:

(1) "Commissioner" means the commissioner of labor and industry.

(2) "Employ" means to suffer or permit to work.

(3) "Employee" includes any individual employed by an employer.

(4) "Farm or ranch" shall mean any endeavor primarily engaged in cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, and poultry and fur-bearing animals and wildlife.

(5) "Farm worker" means any person employed to do any service performed on a farm or ranch.

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed.

(7) "Wage" means compensation due to an employee by



reason of his employment, payable in legal tender of the United States or check on banks convertible into cash on demand at full face value, subject to such allowance as may be permitted by regulations of the commissioner under 39-3-403. The term "wage" includes the reasonable cost to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees; provided, however, that in no case shall such inclusion exceed an amount equal to 40% of the total wage paid by such employer to such employee.

39-3-403. Regulations. The commissioner shall make and revise administrative regulations to carry out the purposes of this part. Such regulations shall take effect upon publication by the commissioner. Any person who is aggrieved by an administrative regulation may obtain a hearing before the commissioner upon filing written protest with the commissioner, who shall thereupon set such matter for hearing in the county of residence of such protestant within 30 days after receipt of such protest. After such hearing, the commissioner shall promulgate such further administrative regulations as the evidence produced at said hearing shall justify.

39-3-404. Minimum wage. (1) Except as may otherwise be provided pursuant to this part, every employer shall pay to each of his employees wages at a rate not less than provided in subsections (1)(a) and (1)(b), save and except for farm workers as herein defined:

(a) \$2.50 an hour for the first year from July 1, 1981;

(b) \$2.75 an hour for the second year from July 1, 1981, and thereafter.

(2) In the case of a farm worker employed for a part of a calendar year which includes periods requiring working hours in excess of 8 hours per day and other seasonal periods requiring working hours substantially less than 8 hours per day, the employer may pay the worker at a fixed rate of compensation during the term of employment. The employer may elect to:

(a) keep a record of the total number of hours worked by the worker during the part of the year during which the worker was employed by him (the total wages paid by such employer to such employee for that part of the year during which said employee was employed by him shall not be less than the applicable minimum wage rate multiplied by the total number of hours so worked); or

(b) in lieu of the minimum wage set forth herein, pay the farm worker a wage as herein defined on a monthly basis. This monthly compensation shall constitute a minimum wage and shall not be less than the following rates:

(i) \$575 a month for the first year from July 1, 1981;

(ii) \$635 a month for the second year from July 1, 1981, and thereafter.

39-3-405. Overtime compensation. (1) No employer shall

employ any of his employees for a workweek longer than 40 hours unless such employee receives compensation for his employment in excess of 40 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which he is employed.

(2) No overtime provision shall apply for farm workers.

(3) Employers of students at an amusement or recreational area that operates on a seasonal basis who furnish said students with board, lodging, or other facilities shall not employ said students for a workweek longer than 48 hours, unless such students receive compensation for their employment in excess of 48 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which they are employed.

39-3-406. Exclusions. (1) The provisions of 39-3-404 and 39-3-405 shall not apply with respect to:

(a) students participating in a distributive education program established under the auspices of an accredited educational agency;

(b) persons employed in private homes whose duties consist of menial chores such as babysitting, mowing lawns, cleaning sidewalks;

(c) persons employed directly by the head of a household to care for children dependent upon the head of the household;

(d) immediate members of the family of an employer or persons dependent upon an employer for half or more of their support in the customary sense of being a dependent;

(e) any persons not regular employees thereof who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;

(f) handicapped workers engaged in work which is incidental to training or evaluation programs or whose earning capacity is so severely impaired that they are unable to engage in competitive employment;

(g) apprentices or learners, who may be exempted by the commissioner for a period not to exceed 30 days of their employment;

(h) learners under the age of 18 who are employed as farm workers, provided that such exclusion shall not exceed a period of 180 days from their initial date of employment and further provided that during this exclusion period wages paid such learners may not be less than 50% of the minimum wage rate established in this part;

(i) retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch;

(j) any individual employed in a bona fide executive, administrative, or professional capacity as these terms are defined and delimited by regulations of the commissioner;

(k) any individual employed by the United States of America.

(2) The provisions of 39-3-405 do not apply to:

(a) an employee with respect to whom the United States Secretary of Transportation has power to establish

qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. 304;

(b) an employee of an employer subject to the provisions of part I of the Interstate Commerce Act;

(c) an individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state;

(d) a salesman, partsman, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers;

(e) a salesman primarily engaged in selling trailers, boats, or aircraft if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;

(f) an employee employed as a driver or driver's helper making local deliveries who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the commissioner finds that such plan has the general purpose and effect of reducing hours worked by such employees to or below the maximum workweek applicable to them under 39-3-405;

(g) an employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit and not operated on a sharecrop basis and which are used exclusively for supply and storing of water for agricultural purposes;

(h) an employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee is:

(i) primarily employed during his workweek in agriculture by such farmer; and

(ii) paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by 39-3-404;

(i) an employee of an establishment commonly recognized as a country elevator, including an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed by the establishment;

(j) a driver employed by an employer engaged in the business of operating taxicabs;

(k) an employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children who are orphans or one of whose natural parents is deceased or who are enrolled in such institution and reside in residential facilities of the institution so long as the children are in residence at the institution and so long as such employee and his spouse reside in such facilities and receive, without cost, board and lodging from the



institution and are together compensated, on a cash basis, at an annual rate of not less than \$10,000;

(l) an employee employed in planting or tending trees; cruising, surveying, or felling timber; or transporting logs or other forestry products to a mill, processing plant, railroad, or other transportation terminal if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(m) an employee of a sheriff's department who is working under an established work period in lieu of a workweek pursuant to 7-4-2509(1);

(n) an employee of a municipal or county government who is working under a work period not exceeding 40 hours in a 7-day period established through a collective bargaining agreement when a collective bargaining unit represents the employee or by mutual agreement of the employer and employee where no bargaining unit is recognized. Employment in excess of 40 hours in a 7-day, 40-hour work period must be compensated at a rate of not less than 1 1/2 times the hourly wage rate for the employee.

(o) an employee of a hospital or other establishment primarily engaged in the care of the sick, disabled, aged, or mentally ill or defective who is working under a work period not exceeding 80 hours in a 14-day period established through either a collective bargaining agreement when a collective bargaining unit represents the employee or by mutual agreement of the employer and employee where no bargaining unit is recognized. Employment in excess of 8 hours per day or 80 hours in a 14-day period must be compensated for at a rate of not less than 1 1/2 times the hourly wage rate for the employee.

(p) a firefighter who is working under a work period established in a collective bargaining agreement entered into between a public employer and a firefighters' organization or its exclusive representative;

(q) an officer or other employee of a police department in a city of the first or second class who is working under a work period established by the chief of police under 7-32-4118.

39-3-407. Enforcement. Enforcement of this part shall be treated as a wage claim action and shall be pursued in accordance with part 2 of this chapter, as amended. This part may also be enforced in accordance with part 5 of this chapter for the benefit of certain employees in the mineral and oil industry. The commissioner may enforce this part without the necessity of a wage assignment.

39-3-408. Provisions cumulative. The provisions of this part shall be in addition to other provisions now provided by law for the payment and collection of wages and salaries but shall not apply to employees covered by the Fair Labor Standards Act.

39-3-601. Short title. This part shall be known as the "Restaurant, Bar, and Tavern Wage Protection Act"

39-3-602. Purpose. The purpose of this part is to protect the state of Montana and employees of persons operating businesses as restaurants, bars, and taverns; to assure the payment of wages to such employees in the event the person ceases operation of his business and is unable to pay the wages due and owing to his employees; and to assure the payment of payroll taxes to the department.

39-3-603. Definitions. For the purposes of this part, the words and phrases used herein have the following meaning:

(1) "Bar" or "tavern" means a house where liquor or beer is sold to be drunk on the premises.

(2) "Beer" means any beverage so defined in the Montana Alcoholic Beverages Code.

(3) "Business" means a commercial enterprise of any kind involving the buying and selling of goods.

(4) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

(5) "Department" means the department of labor and industry provided for in 2-15-1701.

(6) "Employee" means a person who works for wages or salary in the service of an employer.

(7) "Liquor" means any beverage so defined in the Montana Alcoholic Beverages Code.

(8) "Person" includes any establishment, firm, partnership, corporation, person, or association of persons.

(9) "Restaurant" means a public eating house where food is prepared and served for human consumption on the premises.

39-3-604. Bond to be filed -- bond requirements. (1) Every person operating a business as a restaurant, bar, or tavern is hereby required to file a bond equal to at least double the amount of the projected semimonthly payroll with the commissioner. Said bond shall at all times be kept in full force and effect, and any cancellation or revocation thereof or withdrawal of the sureties therefrom is grounds for enjoining the operation of business, as provided for in 39-3-607, until such time as a new bond of like tenure and effect shall have been filed and approved as herein provided.

(2) The bond required by subsection (1) of this section shall be filed with the commissioner. The state of Montana shall be named as the obligee therein, with good and sufficient sureties to be approved by the attorney general.

(3) Such bond shall be conditioned to assure that the employees who perform labor or other personal services are guaranteed their wages in the event the person ceases operation of the business for any reason and is unable to pay the wages due and owing the employees and to assure payment due the department as a result of payroll taxes.

(4) Except as provided in 39-3-605(2), this section does not apply to any person who has operated the same restaurant, bar, or tavern continuously since October 1, 1980.

39-3-605. Waiver of bond -- new or additional bond.

(1) After 3 years of compliance with this part, the commissioner shall waive the provisions of 39-3-604 for any person showing compliance with the applicable provisions of the Fair Labor Standards Act and all the applicable laws administered by the department.

(2) Notwithstanding 39-3-604(4) and subsection (1) of this section, the commissioner may require a person operating a restaurant, bar, or tavern, including a person who has been in business since October 1, 1980, or for over 3 years, to file a new bond or a bond of a greater amount than double the semimonthly payroll whenever the person operating a restaurant, bar, or tavern defaults on the payment of wages, payroll taxes, or workers' compensation premiums.

39-3-606. Power of commissioner to discharge existing sureties and require others. The commissioner of labor and industry may, after due notice given, discharge the existing sureties from further liability and require that other sureties be provided.

39-3-607. Enjoining business until bond filed. If any person operates a restaurant, bar, or tavern business without having first filed a bond as required by 39-3-604 or by 39-3-605, the attorney general, the commissioner, or any citizen, group of citizens, or any association in the county where the violator operates his business may institute an action to enjoin such person from operating the business until compliance with this part has been met.

39-3-608. Unlawful to operate business without bond. From and after October 1, 1983, it shall be unlawful for any person to operate a restaurant, bar, or tavern business without first having filed with the commissioner a bond in accordance with the requirements of 39-3-604 or 39-3-605.

39-3-701. Definitions. As used in this part, unless the context clearly requires otherwise, the following definitions apply:

(1) "Commissioner" means the commissioner of labor and industry.

(2) "Contractor" means any person, firm, association, or corporation engaged in the construction business.

(3) "Resident contractor" means any person who is a bona fide resident of this state, any partnership or association, the majority of whose members are bona fide residents of this state, or any corporation organized and existing under the laws of the state of Montana.

39-3-702. Rules. The commissioner shall promulgate any rules necessary to carry out the provisions of this part.

39-3-703. Contractor to furnish bond for wages and fringe benefits -- bond requirements. (1) Any contractor who contracts with another to do any work or perform any services for the other, except personal services of the



contractor not involving work of hired employees, shall furnish a surety bond or other form of security to the other which shall be:

- (a) approved by the commissioner;
- (b) in an amount equal to the contractor's average monthly payroll as estimated by the commissioner;
- (c) in the name of the state of Montana;
- (d) for the purpose of insuring the wages and fringe benefits of all workers employed by the contractor for the contracted work;
- (e) filed with the commissioner within 1 week of the making of the contract or the commencement of work thereunder, whichever comes first.

(2) Only one bond shall be required on any contractor for each year, and when the bond is filed with and approved by the commissioner, the commissioner shall certify to any person contracting with a contractor that the bond is in full force and effect.

39-3-704. Exception. The provisions of this part do not apply to any resident contractor who presents to the commissioner a financial statement certified by a licensed certified public accountant attesting to a net worth of the contractor in excess of \$50,000.

39-3-705. Suit on bond. Any employee employed by a contractor may bring an action on the surety bond in his own name for unpaid wages and fringe benefits.

39-3-706. Liability of person contracting with contractor for failure to require bond. Any person contracting with a contractor who fails to require the contractor to acquire the surety bond provided for in 39-3-703(1) is liable to the employees of that contractor for their wages and fringe benefits on that particular job.



## HOURS OF LABOR IN CERTAIN EMPLOYMENTS

### Part 1 -- Hours of Labor--Penalties and Liability for Violations Thereof

#### Section

39-4-106. Telephone operators.

39-4-107. State and municipal governments, school districts, mines, mills, and smelters.

39-4-111. Restaurants.

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39-4-106. Telephone operators. (1) On all lines of public telephones operated in whole or in part within this state, it shall hereafter be unlawful for any owner, lessee, company, or corporation to hire or employ any operator or operators, other person or persons to run or operate a telephone board or boards for more than 9 hours in 24 hours in cities or towns having a population of 3,000 inhabitants or over.

(2) The provisions of this section shall not apply to any person or persons, operator or operators operating any telephone board or boards more than 9 hours in each 24 for the purpose of relieving another employee in case of sickness or other unforeseen cause or causes.

(3) Any owner, lessee, company, or corporation who shall violate any of the provisions of this section shall upon conviction be punished by a fine of not less than \$100 or more than \$500. Each and every day that such owner, lessee, company, or corporation may continue to violate any of the provisions of this section shall be considered a separate and distinct offense and shall be punished as such.

39-4-107. State and municipal governments, school districts, mines, mills, and smelters. (1) A period of 8 hours constitutes a day's work in all works and undertakings carried on or aided by any municipal or county government, the state government, or a first-class school district, and on all contracts let by them, and for all janitors (except in courthouses of sixth- and seventh-class counties), engineers, firefighters, caretakers, custodians, and laborers employed in or about any buildings, works, or grounds used or occupied for any purpose by such municipal, county, or state government or first-class school district. A period of 8 hours constitutes a day's work in mills and smelters for the treatment of ores, in underground mines, and in the washing, reducing, and treatment of coal. This subsection does not apply in the event of an emergency when life or property is in imminent danger or to the situations specified in subsections (3) and (4).

(2) The provisions of subsection (1) do not apply to firefighters who are working a work period established in a collective bargaining agreement entered into between a public employer and a firefighters' organization or its

exclusive representative.

(3) In counties where regular road and bridge departments are maintained, the county commissioners may, with the approval of the employees or their duly constituted representative, establish a 40-hour workweek consisting of 4 consecutive 10-hour days. No employee may be required to work in excess of 8 hours in any one workday if he prefers not to.

(4) In municipal and county governments, the employer and employee may agree to a workday of more than 8 hours and to a 7-day, 40-hour work period:

(a) through a collective bargaining agreement when a collective bargaining unit represents the employee; or

(b) by the mutual agreement of the employer and employee when no bargaining unit is recognized.

39-4-111. Restaurants. (1) A period of not more than 8 hours shall constitute a day's work, and a period of not to exceed 48 hours shall constitute a week's work for persons employed in or about restaurants, cafes, lunch counters, and other commercial eating establishments. The hours of work must be so arranged that persons employed in or about restaurants, cafes, lunch counters, and other commercial eating establishments shall not be on duty more than 8 hours in the aggregate of any 12 consecutive hours. Such persons shall have at least 12 consecutive hours off duty.

(2) The provisions of this section shall not apply to any person or persons working more than 8 hours during any 12 consecutive hours or more than 48 hours during any week for the purpose of relieving another employee in case of sickness or where the health of the public is imperiled, where life and property are in imminent danger, or for other unforeseen cause or causes.

(3) Any person, corporation, manager, agent, or employer who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$25 or more than \$50 or by imprisonment in the county jail for not less than 15 days or more than 60 days or by both such fine and imprisonment.

WOMEN IN EMPLOYMENT  
DISPLACED HOMEMAKERS

Part 1 -- Duties of Department of Labor and Industry

Section

- 39-7-101. Legislative policy.  
39-7-102. Rules of procedure and practice.  
39-7-103. Duties of department.  
39-7-104. Department to work in close cooperation with  
commission on human rights.

Part 2 -- Maternity Leave  
(Repealed and Renumbered.  
Sec. 2, 3, Ch. 285, L. 1983)

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39-7-101. Legislative policy. This part establishes as an affirmative policy of this state within the department of labor and industry procedures which will enable women to contribute to society according to their fullest possible potential.

39-7-102. Rules of procedure and practice. The commissioner of the department of labor and industry may issue rules of procedure and practice consistent with the Montana Administrative Procedure Act in order to administer and carry out the purposes of this part.

39-7-103. Duties of department. The department of labor and industry shall:

(1) conduct studies about the changing employment needs and problems of women in Montana and make recommendations to the governor and the legislature;

(2) direct public attention to critical employment problems confronting women as wives, mothers, homemakers, and workers;

(3) serve as a clearinghouse for information and materials pertinent to programs and services available to assist and advise women on employment and related matters;

(4) cooperate with governmental departments and agencies primarily involved in curbing job discrimination and in the expansion of employment rights and opportunities available to the women of this state;

(5) conduct periodic conferences throughout the state to make women more aware of employment opportunities, programs, and services available to them;

(6) serve as the central, permanent agency for the coordination and evaluation of employment programs and services for women of the state and as a planning agency for the development of those services;

(7) encourage women's organizations and other groups to institute local self-help activities designed to meet



women's employment and related needs;

(8) apply for and receive grants, appropriations, or gifts from any federal, state, or local agency, private foundation, or individual to carry out the purposes of this part.

39-7-104. Department to work in close cooperation with commission on human rights. It is the intent of the legislature that the functions in the department of labor and industry delineated in this part pertaining to the status of women shall, where appropriate, be performed in close cooperation with the commission on human rights.



STATE EMPLOYEE CLASSIFICATION,  
COMPENSATION, AND BENEFITS

Part 6 -- Leave Time

- 2-18-601. Definitions.
  - 2-18-602. Repealed.
  - 2-18-603. Holidays -- observance when falling on employee's day off.
  - 2-18-604. Administration of rules.
  - 2-18-605. Sick-pay plan for state employees.
  - 2-18-606 through 2-18-610 reserved.
  - 2-18-611. Annual vacation leave.
  - 2-18-612. Rate earned.
  - 2-18-613. Repealed.
  - 2-18-614. Military leave considered service.
  - 2-18-615. Absence because of illness not chargeable against vacation unless employee approves.
  - 2-18-616. Determination of vacation dates.
  - 2-18-617. Accumulation of leave -- cash for unused -- transfer.
  - 2-18-618. Sick leave.
  - 2-18-619. Jury duty -- service as witness.
  - 2-18-620. Mandatory leave of absence for employees holding public office -- return requirements.
  - 2-18-621. Unlawful termination.
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2-18-601. Definitions. For the purpose of this part, except 2-18-620, the following definitions apply:

(1) "Agency" means any legally constituted department, board, or commission of state, county, or city government or any political subdivision thereof.

(2) "Employee" means any person employed by an agency except elected state, county, and city officials, schoolteachers, and persons contracted as independent contractors or hired under personal services contracts.

(3) "Permanent employee" means an employee who is assigned to a position designated as permanent on the appropriate list of authorized positions referenced in 2-18-206 and approved as such in the biennium budget.

(4) "Part-time employee" means an employee who normally works less than 40 hours a week.

(5) "Full-time employee" means an employee who normally works 40 hours a week.

(6) "Temporary employee" means an employee assigned to a position designated as temporary on the appropriate agency list of authorized positions referenced in 2-18-206, created for a definite period of time not to exceed 9 months.

(7) "Seasonal employee" means an employee assigned to a position designated as seasonal on the appropriate agency list of authorized positions referenced in 2-18-206 and for which the agency has a permanent need but which is interrupted by the seasonal nature of the assignment.

(8) "Vacation leave" means a leave of absence with pay for the purpose of rest, relaxation, or personal business at

the request of the employee and with the concurrence of the employer.

(9) "Sick leave" means a leave of absence with pay for a sickness suffered by an employee or his immediate family.

(10) "Sick-pay plan" means a plan that:

(a) provides for an agency to make payments in lieu of wages to employees on account of sickness or accident disability; and

(b) meets the requirements of 42 U.S.C. 409(b) or (d).

(11) "Transfer" means a change of employment from one agency to another agency in the same jurisdiction without a break in service.

(12) "Continuous employment" means working within the same jurisdiction without a break in service of more than 5 working days or without a continuous absence without pay of more than 15 working days.

(13) "Break in service" means a period of time in excess of 5 working days when the person is not employed and that severs continuous employment.

#### 2-18-602. Repealed. Sec. 12, Ch. 568, L. 1979.

2-18-603. Holidays -- observance when falling on employee's day off. (1) Any full-time employee who is scheduled for a day off on a day which is observed as a legal holiday, except Sundays, shall be entitled to receive a day off with pay either on the day preceding the holiday or on another day following the holiday in the same pay period or as scheduled by the employee and his supervisor, whichever allows a day off in addition to the employee's regularly scheduled days off, provided the employee is in a pay status on his last regularly scheduled working day immediately before the holiday or on his first regularly scheduled working day immediately after the holiday. Part-time employees receive pay for the holiday on a prorated basis according to rules adopted by the department of administration or appropriate administrative officer under 2-18-604.

(2) For purposes of this section, the term "employee" does not include nonteaching school district employees.

2-18-604. Administration of rules. The department of administration or the administrative officer of any county, city, or political subdivision is responsible for the proper administration of the employee annual, sick, or military leave provisions and the jury duty provisions found in this part and shall promulgate rules necessary to achieve the uniform administration of these provisions and to prevent the abuse thereof. When promulgated, the rules are effective as to all employees of the state or any county, city, or political subdivision thereof.

2-18-605. Sick-pay plan for state employees. The department of administration shall develop and administer a sick-pay plan for state employees. The plan shall be based on the use of sick leave credits provided for in 2-18-618. Payments from the plan may be made only from funds

appropriated for that purpose. Until the plan is developed and implemented or if no funds are appropriated or if appropriated funds are insufficient to fully fund the plan, state employees may utilize sick leave provided for in 2-18-618, including accrued sick leave.

2-18-606 through 2-18-610 reserved.

2-18-611. Annual vacation leave. (1) Each permanent full-time employee shall earn annual vacation leave credits from the first day of employment. For calculating vacation leave credits, 2,080 hours (52 weeks x 40 hours) shall equal 1 year. Vacation leave credits earned shall be credited at the end of each pay period. However, employees are not entitled to any vacation leave with pay until they have been continuously employed for a period of 6 calendar months.

(2) Seasonal employees shall earn vacation credits. However, such persons must be employed 6 qualifying months before they may use the vacation credits. In order to qualify, such employees must immediately report back for work when operations resume in order to avoid a break in service.

(3) Permanent part-time employees are entitled to prorated annual vacation benefits if they have worked the qualifying period.

(4) An employee may not accrue annual vacation leave credits while in a leave-without-pay status.

(5) Temporary employees do not earn vacation leave credits, except that a temporary employee who is subsequently hired into a permanent position within the same jurisdiction without a break in service and temporary employees who are employed continuously longer than 6 months may count as earned leave credits for the immediate term of temporary employment.

2-18-612. Rate earned. Vacation leave credits are earned at a yearly rate calculated in accordance with the following schedule, which applies to the total years of an employee's employment with any agency whether the employment is continuous or not:

Years of employment	Working days credit
1 day through 10 years	15
10 years through 15 years	18
15 years through 20 years	21
20 years on	24

2-18-613. Repealed. Sec. 12, Ch. 568, L. 1979.

2-18-614. Military leave considered service. A period of absence from employment with the state, county, or city occurring either during a war involving the United States or in any other national emergency and for 90 days thereafter for one of the following reasons is considered as service for the purpose of determining the number of years of employment used in calculating vacation leave credits under

this section:

- (1) having been ordered on active duty with the armed forces of the United States;
- (2) voluntary service on active duty in the armed forces or on ships operated by or for the United States government; or
- (3) direct assignment to the United States department of defense for duties related to national defense efforts if a leave of absence has been granted by the employer.

2-18-615. Absence because of illness not chargeable against vacation unless employee approves. Absence from employment by reason of illness shall not be chargeable against unused vacation leave credits unless approved by the employee.

2-18-616. Determination of vacation dates. The dates when employees' annual vacation leaves shall be granted shall be determined by agreement between each employee and his employing agency with regard to the best interest of the state, any county or city thereof as well as the best interests of each employee.

2-18-617. Accumulation of leave -- cash for unused -- transfer. (1) Annual vacation leave may be accumulated to a total not to exceed two times the maximum number of days earned annually as of the end of the first pay period of the next calendar year. Excess vacation time is not forfeited if taken within 90 calendar days from the last day of the calendar year in which the excess was accrued.

(2) An employee who terminates his employment for reason not reflecting discredit on himself shall be entitled upon the date of such termination to cash compensation for unused vacation leave, assuming that the employee has worked the qualifying period set forth in 2-18-611.

(3) However, if an employee transfers between agencies of the same jurisdiction, there shall be no cash compensation paid for unused vacation leave. In such a transfer the receiving agency assumes the liability for the accrued vacation credits transferred with the employee.

2-18-618. Sick leave. (1) Each permanent full-time employee shall earn sick leave credits from the first day of employment. For calculating sick leave credits, 2,080 hours (52 weeks x 40 hours) shall equal 1 year. Sick leave credits shall be credited at the end of each pay period. Sick leave credits shall be earned at the rate of 12 working days for each year of service without restriction as to the number of working days that may be accumulated. Employees are not entitled to be paid sick leave until they have been continuously employed 90 days.

(2) An employee may not accrue sick leave credits while in a leave-without-pay status.

(3) Permanent part-time employees are entitled to prorated leave benefits if they have worked the qualifying period.

(4) Full-time temporary and seasonal employees are



entitled to sick leave benefits provided they work the qualifying period.

(5) An employee who terminates employment with the agency is entitled to a lump-sum payment equal to one-fourth of the pay attributed to the accumulated sick leave. The pay attributed to the accumulated sick leave shall be computed on the basis of the employee's salary or wage at the time he terminates his employment with the state, county, or city. Accrual of sick leave credits for calculating the lump-sum payment provided for in this subsection begins July 1, 1971. The payment therefor shall be the responsibility of the agency wherein the sick leave accrues. However, no employee forfeits any sick leave rights or benefits he had accrued prior to July 1, 1971. However, where an employee transfers between agencies within the same jurisdiction, he shall not be entitled to a lump-sum payment. In such a transfer the receiving agency shall assume the liability for the accrued sick leave credits earned after July 1, 1971, and transferred with the employee.

(6) An employee who receives a lump-sum payment pursuant to this section and who is again employed by any agency shall not be credited with any sick leave for which the employee has previously been compensated.

(7) Abuse of sick leave is cause for dismissal and forfeiture of the lump-sum payments provided for in this section.

2-18-619. Jury duty -- service as witness. (1) Each employee who is under proper summons as a juror shall collect all fees and allowances payable as a result of the service and forward the fees to the appropriate accounting office. Juror fees shall be applied against the amount due the employee from his employer. However, if an employee elects to charge his juror time off against his annual leave, he shall not be required to remit his juror fees to his employer. In no instance is an employee required to remit to his employer any expense or mileage allowance paid him by the court.

(2) An employee subpoenaed to serve as a witness shall collect all fees and allowances payable as a result of the service and forward the fees to the appropriate accounting office. Witness fees shall be applied against the amount due the employee from his employer. However, if an employee elects to charge his witness time off against his annual leave, he shall not be required to remit his witness fees to his employer. In no instance is an employee required to remit to his employer any expense or mileage allowances paid him by the court.

(3) Employers may request the court to excuse their employees from jury duty if they are needed for the proper operation of a unit of state or local government.

2-18-620. Mandatory leave of absence for employees holding public office -- return requirements. (1) Employers of employees elected or appointed to a public office in the city, county, or state shall grant such employees leaves of absence, not to exceed 180 days per year, while they are

performing public service.

(2) Employees granted a leave shall make arrangements to return to work within 10 days following the completion of the service for which the leave was granted unless they are unable to do so because of illness or disabling injury certified to by a licensed physician.

(3) Any unemployment benefits paid to any person by application of this section shall not be charged against any employer under the unemployment insurance law.

2-18-621. Unlawful termination. It shall be unlawful for an employer to terminate or separate an employee from his employment in an attempt to circumvent the provisions of 2-18-611, 2-18-612, and 2-18-614. Should a question arise under this section, it shall be submitted to arbitration as provided in Title 27, chapter 5, unless there is a collective bargaining agreement applicable.



## CONSTRUCTION CONTRACTS

### Part 4 -- Special Conditions--Labor

- 18-2-401. Definitions.
- 18-2-402. Standard prevailing rate of wages.
- 18-2-403. Preference of Montana labor in public works -- wages -- federal exception.
- 18-2-404. Approval of contract -- bond.
- 18-2-405. When fringe benefits paid as wages.
- 18-2-406. Posting wage scale.
- 18-2-407. Forfeiture for failure to pay prevailing wages.
- 18-2-408. Penalty for violation.
- 18-2-409 through 18-2-420 reserved.
- 18-2-421. Notice.
- 18-2-422. Bid specification and contract to contain prevailing wage rate.
- 18-2-423. Submission of payroll records.
- 18-2-424. Enforcement.

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18-2-401. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

(1) "Labor" is hereby defined to be all services performed in the construction, repair, or maintenance of all state, county, municipal, and school work and does not include engineering, superintendence, management, or office or clerical work.

(2) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

(3) "Department" means the department of labor and industry provided for in 2-15-1701.

(4) A "bona fide resident of Montana" is hereby declared to be a person who, at the time of his employment and immediately prior thereto, has lived in this state in such a manner and for such time as is sufficient to clearly justify the conclusion that his past habitation in this state has been coupled with intention to make it his home. Sojourners or persons who come to Montana solely in pursuance of any contract or agreement to perform such labor shall under no circumstance be deemed to be bona fide residents of Montana within the meaning and for the purpose of this part.

(5) (a) "Standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions applicable to the county or locality in which the work is being performed," means those wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions, which are paid in the county or locality by other contractors for work of a similar character performed in that county or locality by each craft, classification, or type of worker needed to complete a contract under this part.

(b) When work of a similar character is not being performed in the county or locality, the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions, shall be those rates established by collective bargaining agreements in effect in the county or locality for each craft, classification, or type of worker needed to complete the contract.

18-2-402. Standard prevailing rate of wages. (1) The Montana commissioner of labor may determine the standard prevailing rate of wages in the county or locality in which the contract is to be performed. The commissioner shall undertake to keep and maintain copies of collective bargaining agreements and other information from which rates and jurisdictional areas applicable to public works contracts under this part may be ascertained.

(2) The provisions of this part do not apply in those instances where the standard prevailing rate of wages is determined pursuant to federal law.

(3) In no instances where this part is applicable shall the standard prevailing rate of wage be determined to be greater than the applicable rate of wage in the area for the particular work in question as negotiated under existing and current collective bargaining agreements.

18-2-403. Preference of Montana labor in public works -- wages -- federal exception. (1) In any contract let for state, county, municipal, school, or heavy highway construction, services, repair, or maintenance work under any law of this state, there shall be inserted in the bid specification and the contract a provision requiring the contractor to give preference to the employment of bona fide Montana residents in the performance of the work and to pay the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions, in effect and applicable to the county or locality in which the work is being performed.

(2) No contract may be let to any person, firm, association, or corporation refusing to execute an agreement with the above-mentioned provisions in it, provided that in contracts involving the expenditure of federal-aid funds this part may not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged veterans of the armed forces and prohibiting as unlawful any other preference or discrimination among citizens of the United States.

(3) Failure to include the provisions required by 18-2-422 in a public works contract relieves the contractor from his obligation to pay the standard prevailing wage rate and places such obligation on the public contracting agency.

18-2-404. Approval of contract -- bond. (1) All public works contracts under this part shall be approved in writing by the legal adviser of the contracting state, county, municipal corporation, school district, assessment district,

or special improvement district body or officer prior to execution by the contracting public officer or officers.

(2) In all contracts entered into under the provisions of this part at least \$1,000 of the contract price shall be withheld at all times until the termination of the contract.

18-2-405. When fringe benefits paid as wages. Whenever the employer is not signatory party to a collective bargaining agreement, those moneys designated as negotiated fringe benefits shall be paid to the employee as wages.

18-2-406. Posting wage scale. Contractors, subcontractors, and employers who are performing work or providing services under public works contracts as provided in this part shall post in a prominent and accessible site on the project or work area, not later than the first day of work, a legible statement of all wages to be paid to the employees employed on such site or work area.

18-2-407. Forfeiture for failure to pay prevailing wages. (1) Any contractor, subcontractor, or employer who shall pay workers or employees at less than the standard prevailing wage as established under the public works contract shall forfeit to the contracting agency the sum of \$25 a day for each worker so underpaid.

(2) Whenever it shall appear to the contracting agency or to the Montana commissioner of labor that there are insufficient moneys due to the contractor or the employer under the terms of the contract to cover such penalties, the Montana commissioner of labor may, within 90 days after the filing of notice of completion of the project and its acceptance by the contracting agency, maintain an action in district court to recover all such penalties and forfeitures due. Nothing in this part shall prevent the individual worker who has been underpaid from maintaining an action for recovery of the wages due under the contract as provided in Title 39, chapter 3, part 2.

18-2-408. Penalty for violation. (1) If any person, firm, or corporation shall fail to comply with the provisions of this part, the state, county, municipal, or school officers who have executed the contract shall retain \$1,000 of the contract price as liquidated damages for the violation of the terms of the contract and said money shall be credited to the proper funds of the state, county, municipal, or school districts.

(2) Any firm or corporation violating the provisions of this part shall have his or its license suspended in the manner prescribed by 37-71-301 for a period of 1 year after the date of final judgment of said violation by any district court or the supreme court.

(3) Whenever any action shall have been instituted in any district court in this state against any person, firm, or corporation for the violation of this part, the court in which said action is pending shall be and it is hereby authorized to issue an injunction to restrain any such person, firm, or corporation from proceeding with his or its



contract with the state, county, municipal, or school districts, pending the final determination of said action so instituted.

18-2-409 through 18-2-420 reserved.

18-2-421. Notice. When a public works project is accepted by the public contracting agency, a notice of acceptance and the completion date of the project shall be sent to the department. However, in the case of projects that amount to \$50,000 or less in cost, the notice of acceptance and the completion date of the project is not required unless the department requests that information. The 90-day limitation for filing an action in district court as provided in 18-2-407 does not begin until the public contracting agency notifies the department of its acceptance of the public works project.

18-2-422. Bid specification and contract to contain prevailing wage rate. All bid specifications and contracts for public works projects must contain a provision stating for each job classification the prevailing wage rate, including fringe benefits, that the contractors and subcontractors must pay during construction of the project.

18-2-423. Submission of payroll records. If a complaint is filed with the department alleging noncompliance with 18-2-422, the department may require the project to submit to it certified copies of the payroll records for workers employed on that project.

18-2-424. Enforcement. If a contractor or a subcontractor refuses to submit payroll records requested by the department pursuant to 18-2-423, the commissioner or his authorized representative may issue subpoenas compelling the production of those records.

## CHILD LABOR

### Part 1 -- Prohibited Employment of Children

#### Section

- 41-2-101. Employment of children prohibited -- when.
- 41-2-102 through 41-2-110 reserved.
- 41-2-111. Liability of parent.
- 41-2-112. Record of children under the age of sixteen years.
- 41-2-113. Age certificates.
- 41-2-114. Enforcement.
- 41-2-115 through 41-2-120 reserved.
- 41-2-121. Penalties.

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#### 41-2-101. Employment of children prohibited -- when.

Any person, company, firm, association, or corporation engaged in business in this state or any agent, officer, foreman, or other employee having control or management of employees or having the power to hire or discharge employees who shall knowingly employ or permit to be employed any child under the age of 16 years to render or perform any service or labor, whether under contract of employment or otherwise, in, on, or about any mine; mill; smelter; workshop; factory; steam, electric, hydraulic, or compressed-air railroad; or passenger or freight elevator or where any machinery is operated or for any telegraph, telephone, or messenger company or in any occupation not herein enumerated which is known to be dangerous or unhealthful or which may be in any way detrimental to the morals of said child shall be guilty of a misdemeanor and punishable as hereinafter provided.

#### 41-2-102 through 41-2-110 reserved.

41-2-111. Liability of parent. Any parent, guardian, or other person having the care, custody, or control of any child under the age of 16 years who shall permit, suffer, or allow any such child to work or perform service for any person, company, firm, association, or corporation doing business in this state or who shall permit or allow any such child over whom he has such care, custody, or control to retain such employment as is prohibited in 41-2-101, whether under contract of employment or not, shall be guilty of a misdemeanor and punishable as hereinafter provided.

41-2-112. Record of children under the age of sixteen years. The commissioner of labor and industry shall compile and preserve in his office from reports made to him by the county superintendents of schools, as otherwise provided, a full and complete list of the name, age, date of birth, and sex of each child and the names of the parents or guardians of each child under the age of 16 years who is now or may

hereafter become a resident of this state, and such list shall be the official record of the age of children in this state.

41-2-113. Age certificates. Upon obtaining the age of 16 years any child may make application to the commissioner of labor and industry for an age certificate, which must be presented to any employer with whom the child seeks employment. The employer, if such employment be given, must countersign the certificate and return it to the commissioner, who shall keep it on file in his office. Any person, firm, company, association, or corporation who employs or permits to be employed in any occupation prohibited by 41-2-101 any child without such certificate showing the child to be at least 16 years of age is guilty of a misdemeanor and punishable as hereinafter provided should such child prove to be less than 16 years of age.

41-2-114. Enforcement. To enforce this part the commissioner of labor and industry and each county attorney shall, each upon his own volition or upon the sworn complaint of any reputable citizen that this part is being violated, make prosecutions for such violations.

41-2-115 through 41-2-120 reserved.

41-2-121. Penalties. Every person, firm, company, association, or corporation who violates any of the provisions of this part shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$25 or more than \$500 or by imprisonment in the county jail for a period of not less than 30 days or more than 6 months or by both such fine and imprisonment.



## VETERANS

### Part 2 -- Employment

- 10-2-201. Purpose.
- 10-2-202. Definitions.
- 10-2-203. Preference in appointment and employment.
- 10-2-204. Credit for examination.
- 10-2-205. Eligibility.
- 10-2-206. Enforcement of preference.
- 10-2-207 through 10-2-210 reserved.
- 10-2-211. Reemployment of veterans upon completion of service.
- 10-2-212. Private employer's duty.
- 10-2-213. Restoration of benefits.
- 10-2-214. Enforcement procedure.
- 10-2-215 through 10-2-220 reserved.
- 10-2-221. Reemployment of public employee upon completion of service.
- 10-2-222. Application for reemployment.
- 10-2-223. Application for reinstatement of officer.
- 10-2-224. Reinstatement for remainder of term.
- 10-2-225. No loss of seniority or benefits.
- 10-2-226. Enforcement.
- 10-2-227. Acting officer -- how appointed.
- 10-2-228. Absence for military service creates no vacancy in office.

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10-2-201. Purpose. The purpose of 10-2-201 through 10-2-206 is to provide for preference of veterans, their dependents and unremarried surviving spouses, and certain disabled civilians in appointment and employment in every public department and upon all public works of the state of Montana and of any county and city thereof.

10-2-202. Definitions. For purposes of 10-2-201 through 10-2-206, the following definitions apply:

(1) The term "veterans" means persons:

(a) who served in the armed forces of the United States in time of war or declared national emergency and who have been separated from service upon conditions other than dishonorable; or

(b) who after January 31, 1955:

(i) served on active military duty for more than 180 days or were discharged or released because of a service-connected disability; and

(ii) were honorably discharged.

(2) The term "war or declared national emergency" includes:

(a) The Civil War;

(b) The Spanish-American War;

(c) The Philippine insurrection;

(d) World War I, between April 6, 1917, and November

11, 1918, both dates inclusive;

(e) World War II, between September 16, 1940, and December 31, 1946, both dates inclusive;

(f) The Korean conflict, military expedition, or police action, between June 26, 1950, and January 31, 1955, both dates inclusive; and

(g) The Vietnam conflict between August 5, 1964, and May 7, 1975, both dates inclusive.

(3) The term "surviving spouse" means an unremarried surviving spouse of a veteran.

(4) The word "percent" means percent of the total aggregate points of the examination referred to.

10-2-203. Preference in appointment and employment.

(1) In every public department and upon all public works of the state of Montana and of any county or city thereof, the following shall be preferred for appointment and employment: veterans, their spouses and surviving spouses, and the other dependents of disabled veterans and disabled civilians recommended by the rehabilitative services division of the department of social and rehabilitation services.

(2) Age, loss of limb, or other physical impairment which does not in fact incapacitate does not disqualify any disabled veteran or civilian provided he or she possesses the business capacity, competency, and education to discharge the duties of the position involved.

(3) Those of the above-described veterans who have disabilities admitted by the veterans administration of the United States to have been incurred in service in any of the wars, military expeditions, or police actions, whenever such disabilities do not in fact incapacitate, shall be given preference in employment over other veterans.

10-2-204. Credit for examination. (1) When written or oral examinations are required for employment, disabled veterans and their spouses, their surviving spouses, and other dependents shall have added to their examination ratings a credit of 10 points. All other veterans, their spouses, surviving spouses, and dependents shall have added to their examination ratings a credit of 5 points.

(2) The fact that an applicant has claimed a veterans' credit may not be made known to the examiners until ratings of all applicants have been recorded, after which such credits shall be added to the examination rating and the records shall show the examination rating and the veteran's credit.

(3) The benefits of this section are in addition to and not in derogation of the preference in appointment and employment or both given by 10-2-203.

10-2-205. Eligibility. (1) None of the benefits of 10-2-201 through 10-2-206 accrue to any person who refused to serve on active duty in the military service to which attached or to take up arms in the defense of the United States.

(2) No person who has not been a resident of Montana for at least 1 year immediately preceding an appointment is

entitled to such preference.

(3) For city or county employment, no preference will be granted unless an applicant under 10-2-201 through 10-2-206 is also a resident of the city or town or county in which employment is sought.

10-2-206. Enforcement of preference. Any person entitled to preference in 10-2-201 through 10-2-206 who has applied for any appointment or employment upon public works of the state of Montana or any county and city thereof or in any public department of the state and who has been denied employment or appointment and feels that the spirit of 10-2-201 through 10-2-206 has been violated and that such person is in fact qualified physically and mentally and possesses business capacity, competency, and education to discharge the duties of the position applied for may petition by verified petition the district court of the state of Montana in the county in which the work is to be performed. The petition shall set forth the facts of the application, qualifications, competency, and such person's honorable discharge or other qualifications warranting the applicant to preference under 10-2-201 through 10-2-206. Upon filing of such petition, any judge in the court shall issue an order to show cause to the appointing authority directing the appointing authority to appear in the court at a specified time and place, not less than 5 or more than 10 days after the filing of the verified petition, to show cause, if any exists, why the veteran or person entitled to preference should not be employed by the appointing authority. The district court has jurisdiction upon the proper showings to issue its order directing and ordering the appointing authority to comply with this law in giving the preference provided for.

10-2-207 through 10-2-210 reserved.

10-2-211. Reemployment of veterans upon completion of service. (1) Any person inducted into the armed forces of the United States as a result of the operation of any selective training and service act or national guard and reserve officers mobilization act since 1948 who has satisfactorily completed his period of training or service as attested by a certificate to that effect shall be reemployed in the position he left in order to perform such training or service if:

(a) he is still qualified to perform the duties of the position;

(b) the position he formerly held was not a temporary one; and

(c) he makes application for reemployment within 40 days after he is retired from training or service.

(2) Should any person qualified for reemployment be a schoolteacher or instructor, the board of trustees or other employing agency of the school involved is not obligated to rehire the person until the beginning of the semester or quarter following the one in which the application for reemployment was made.



10-2-212. Private employer's duty. If such person was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

10-2-213. Restoration of benefits. Any person who is restored to a position in accordance with 10-2-211 or 10-2-212 shall be considered as having been on leave of absence during the period of training or service in the armed forces of the United States and at the expiration of the period shall be entitled to be restored to his employment without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer in accordance with established rules and practices relating to employees on leave of absence, and shall not be discharged from the position without cause within 1 year after restoration.

10-2-214. Enforcement procedure. In case any private employer refuses to reemploy any person entitled to reemployment under the provisions of 10-2-211 through 10-2-214, the district court of the judicial district in which such private employer maintains his place of business has power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to such benefits, to specifically require such employer to comply with 10-2-211 through 10-2-214, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by such employer's unlawful action. Upon application to the county attorney of the county in which such private employer maintains a place of business by any person claiming to be entitled to redress under 10-2-211 through 10-2-214, the county attorney shall appear and act as attorney for such person in the amicable settlement of the claim or in the filing of any motion, petition, or other appropriate pleading to specifically require such employer to comply with such provisions. No fees or court costs may be taxed against the person applying for such benefits. (11)

10-2-215 through 10-2-220 reserved.

10-2-221. Reemployment of public employee upon completion of service. Any person inducted into the armed forces of the United States or any member of any reserve component of the armed forces or national guard or any retired personnel ordered into the active military service of the United States who, in order to perform such training, service, or active duty, leaves a position, other than a temporary position, in the employ of the state or any political subdivision thereof and who receives a certificate of completion of training or service from the proper authorities of the United States government and is still qualified to perform the duties of such position shall be restored to:

(1) the position or to a position of like seniority,

status, and pay if the position was in the employ of the state or any political subdivision thereof, excluding elective positions, and the position or department has not been abolished or consolidated; or

(2) the position, status, and pay at any time during the term for which he was elected if the position was that of an elected, executive, or judicial officer of the state or any political subdivision thereof.

10-2-222. Application for reemployment. A person asking restoration to a position in accordance with the provisions of 10-2-221(1) shall, in order to qualify for the restoration of such position, make application for reemployment within 40 days after he is relieved from such training and service. Such application must be in writing and presented to the officer, district, board, or employing unit of the state or political subdivision thereof by which such applicant was formerly employed.

10-2-223. Application for reinstatement of officer. A person seeking restoration to an elective office in accordance with the provisions of 10-2-221(2) shall, in order to qualify under the provisions of that section, make application for reinstatement to such office within 40 days after he is relieved from such training and service. Such applications must be in writing and presented to the governor in the case of state elective offices and to the board of county commissioners in the case of county, township, or district offices.

10-2-224. Reinstatement for remainder of term. Any person who is restored to a position in accordance with the provisions of 10-2-221(2) shall be considered as having been on leave of absence during his period of active military service and shall be immediately so restored to his official position as such officer for the balance of the term for which he was elected.

10-2-225. No loss of seniority or benefits. Any person who is restored to a position in accordance with the provisions of 10-2-221(1) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority (if seniority rules are applicable in such particular position), shall be entitled to participate in any insurance or other benefits offered by the state of Montana or the political subdivision thereof pursuant to established rules and practices relating to employees on furlough or on leave of absence in effect at the time such person is ordered into such service and, except as otherwise provided herein, shall not be discharged from such position without cause within 1 year after such restoration.

10-2-226. Enforcement. In case of any failure or refusal by any officer, board, department, or employing unit of the state or any political subdivision thereof to comply



with the provisions of 10-2-221, 10-2-224, or 10-2-225, the district court of the state of Montana for the county in which such person seeking restoration of position resides shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of these provisions, to specifically require such officer, department, board, or employing unit to comply with such provision for any loss of wages or benefits suffered by reason of such an unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the county attorney of the county in which the applicant resides in the case of county, township, and district offices and positions and to the attorney general of the state of Montana in the case of state offices and positions, by any person claiming to be entitled to the benefits of such provisions, such county attorney or attorney general, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and prosecution thereof to specifically require a compliance with such provisions; provided that no fees or court costs shall be taxed against the person so applying for such benefits.

10-2-227. Acting officer -- how appointed. The governor, in the case of district judges and officers elected from the state at large, and the board of county commissioners, in the case of members of either house of the legislature and county, township, or district officers elected from such county, shall appoint an "acting" officer to temporarily replace any elected officer, designated in 10-2-221(2), who enters military service in the manner set forth in 10-2-221. "Acting" officers so appointed shall be appointed for a period not to exceed the unexpired term of the officer whose duties he assumes, and such appointment shall be subject to the right of the elected officer to the restoration of his position. (11

10-2-228. Absence for military service creates no vacancy in office. It is specifically provided that the provisions of 2-16-112, subsections (5), (6), and (7) of 2-16-501, and 7-4-2208, shall not be, and the same are declared not to be, applicable insofar as they relate to absence or residence of any officer of the state or political subdivision thereof caused by the military service of such officer as set forth in 10-2-221. It is specifically declared that the absence of such officer caused by such military service shall not create a vacancy in the office to which he was elected.

## BASIC RIGHTS

### Part 1 -- Basic Personal Rights

#### Section

- 49-1-101. Right of protection from personal injury.
- 49-1-102. Freedom from discrimination.
- 49-1-103. Right to use force.

### Part 2 -- Basic Political Rights

- 49-1-201. Right to state's protection.
- 49-1-202. Right to hold elected office.
- 49-1-203. Rights and duties of electors as compared to nonelectors.
- 49-1-204. Rights and duties of citizens of other states.

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49-1-101. Right of protection from personal injury. Besides the personal rights mentioned or recognized in other statutes and subject to the qualifications and restrictions provided by law, every person has the right of protection from bodily restraint or harm, personal insult, defamation, and injury to his personal relations.

49-1-102. Freedom from discrimination. The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental handicap, age, or national origin is recognized as and declared to be a civil right. This right shall include but not be limited to:

(1) the right to obtain and hold employment without discrimination; and

(2) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.

49-1-103. Right to use force. Any necessary force may be used to protect from wrongful injury the person or property of one's self, of a wife, husband, child, parent, or other relative or member of one's family, or of a ward, servant, master, or guest.

49-1-201. Right to state's protection. Every person while within the jurisdiction of this state is entitled to its protection.

49-1-202. Right to hold elected office. Every elector is eligible to the office for which he is an elector, except where otherwise specially provided.

49-1-203. Rights and duties of electors as compared to nonelectors. An elector has no rights or duties beyond those of a citizen not an elector, except the right and duty of

holding and electing to office.

49-1-204. Rights and duties of citizens of other states. A citizen of the United States who is not a citizen of this state has the same rights and duties as a citizen of this state not an elector.

# ILLEGAL DISCRIMINATION

## Part 1 -- General Provisions

### Section

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- 49-2-507. Procedure upon failure to find discrimination.
- 49-2-508. Injunction to enforce commission order.
- 49-2-509. Filing a complaint in district court.

## Part 6 -- Penalties



49-2-101. Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Age" means number of years since birth. It does not mean level of maturity or ability to handle responsibility. These latter criteria may represent legitimate considerations as reasonable grounds for discrimination without reference to age.

(2) "Commission" means the commission for human rights provided for in 2-15-1706.

(3) "Credit" means the right granted by a creditor to a person to defer payment of a debt, to incur debt and defer its payment, or to purchase property or services and defer payment therefor. It includes without limitation the right to incur and defer debt which is secured by residential real property.

(4) "Credit transaction" means any invitation to apply for credit, application for credit, extension of credit, or credit sale.

(5) "Creditor" means a person who, regularly or as a part of his business, arranges for the extension of credit for which the payment of a financial charge or interest is required, whether in connection with loans, sale of property or services, or otherwise.

(6) "Educational institution" means a public or private institution and includes an academy; college; elementary or secondary school; extension course; kindergarten; nursery; school system; university; business, nursing, professional, secretarial, technical, or vocational school; or agent of an educational institution.

(7) "Employee" means any individual employed by an employer.

(8) "Employer" means an employer of one or more persons but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis.

(9) "Employment agency" means a person undertaking to procure employees or opportunities to work.

(10) "Financial institution" means a commercial bank, trust company, savings bank, finance company, savings and loan association, investment company, or insurance company.

(11) "Housing accommodation" means a building or portion of a building, whether constructed or to be constructed, which is or will be used as the sleeping quarters of its occupants.

(12) "Labor organization" means an organization or an agent of an organization organized for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances or terms or conditions of



employment, or of other mutual aid and protection of employees.

(13) "Mental handicap" means any mental disability resulting in subaverage intellectual functioning or impaired social competence.

(14) "National origin" means ancestry.

(15) "Person" means one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated employees' associations, employers, employment agencies, or labor organizations.

(16) "Physical handicap" means a physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including epilepsy. It includes without limitation any degree of paralysis; amputation; lack of physical coordination; blindness or visual impediment; deafness or hearing impediment; muteness or speech impediment; or physical reliance on a guide dog for the blind, a wheelchair, or any other remedial appliance or device.

(17) "Public accommodation" means a place which caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons alike. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbershop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.

(18) "Staff" or "commission staff" means the staff of the commission for human rights.

49-2-102. Records to be kept. The state, employers, labor organizations, and employment agencies shall maintain records on age, sex, and race that are required to administer the civil rights laws and regulations. These records are confidential and available only to federal and state personnel legally charged with administering civil rights laws and regulations. However, statistical information compiled from records on age, sex, and race shall be made available to the general public.

49-2-201. Commission staff. (1) The staff may include an attorney as legal counsel. He shall advise the commission in legal matters arising in the discharge of its duties, assist in the preparation and presentation of complaints to the commission, and represent the commission in legal actions to which it is a party. The attorney general shall perform this function at the request of the commission.

(2) In addition the commission may appoint hearing examiners to hear contested cases and petitions for declaratory rulings.

49-2-202. Authority to require posted notice. The commission may require any employer, employment agency, labor union, educational institution, or financial institution or the owner, lessee, manager, agent, or employee of any public accommodation or housing accommodation subject to this chapter to post, in a conspicuous place on his premises or in the accommodation, a notice to be prepared or approved by the commission containing relevant information that the commission considers necessary to explain this chapter. Any person or institution subject to this section who refuses to comply with an order of the commission respecting the posting of a notice is guilty of a misdemeanor and punishable by a fine of not more than \$50.

49-2-203. Subpoena power. (1) The commission may subpoena witnesses, take the testimony of any person under oath, administer oaths, and, in connection therewith, require the production for examination of books, papers, or other tangible evidence relating to a matter either under investigation by the commission staff or in question before the commission. The commission may delegate the foregoing powers to a person within the staff for the purpose of investigating a complaint.

(2) Subpoenas issued pursuant to this section may be enforced as provided in 2-4-104 of the Montana Administrative Procedure Act.

49-2-204. Commission to adopt rules. The commission shall adopt procedural and substantive rules necessary to implement this chapter. Rulemaking procedures shall comply with the requirements of the Montana Administrative Procedure Act.

49-2-301. Retaliation prohibited. It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

49-2-302. Aiding, coercing, or attempting. It is unlawful for a person, educational institution, financial institution, or governmental entity or agency to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, color, or national origin or because of his age, physical or mental

handicap, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental handicap, marital status, or sex distinction;

(c) an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication or to use an employment application which expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to discriminate against any individual because of sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications shall be strictly construed.

49-2-304. Discrimination in public accommodations. Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

(1) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, race, age, physical or mental handicap, creed, religion, color, or national origin;

(2) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, age, physical or mental handicap, color, or national origin.

49-2-305. Discrimination in housing. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, or other person having the right to sell, lease, or rent a housing accommodation or improved or unimproved property:

(a) to refuse to sell, lease, or rent the housing accommodation or property to a person because of sex, race,



creed, religion, color, age, physical or mental handicap, or national origin;

(b) to discriminate against a person because of sex, race, creed, religion, age, physical or mental handicap, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of the housing accommodation or property;

(c) to make a written or oral inquiry or record of the sex, race, creed, religion, age, physical or mental handicap, color, or national origin of a person seeking to buy, lease, or rent the housing accommodation or property; or

(d) to refuse to negotiate for a sale or to make a housing accommodation or property unavailable because of sex, race, creed, religion, age, physical or mental handicap, color, or national origin.

(2) A private residence designed for single-family occupancy in which sleeping space is rented to guests and in which the landlord also resides is excluded from the provisions of subsection (1).

(3) It is also an unlawful discriminatory practice to make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement that indicates any preference, limitation, or discrimination that is prohibited by subsection (1) or any intention to make or have such a preference, limitation, or discrimination.

49-2-306. Discrimination in financing and credit transactions. (1) It is an unlawful discriminatory practice for a financial institution, upon receiving an application for financial assistance, to permit an official or employee, during the execution of his duties, to discriminate against the applicant because of sex, marital status, race, creed, religion, age, physical or mental handicap, color, or national origin in a term, condition, or privilege relating to the obtainment or use of the institution's financial assistance, unless based on reasonable grounds.

(2) It is an unlawful discriminatory practice for a creditor to discriminate on the basis of race, color, religion, creed, national origin, age, mental or physical handicap, sex, or marital status against any person in any credit transaction which is subject to the jurisdiction of any state or federal court of record.

49-2-307. Discrimination in education. It is an unlawful discriminatory practice for an educational institution:

(1) to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution because of race, creed, religion, sex, marital status, color, age, physical handicap, or national origin or because of mental handicap, unless based on reasonable grounds;

(2) to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information or to make or keep a record concerning

the race, color, sex, marital status, age, creed, religion, physical or mental handicap, or national origin of an applicant for admission, except as permitted by regulations of the commission;

(3) to print, publish, or cause to be printed or published a catalog or other notice or advertisement indicating a limitation, specification, or discrimination based on the race, color, creed, religion, age, physical or mental handicap, sex, marital status, or national origin of an applicant for admission; or

(4) to announce or follow a policy of denial or limitation of educational opportunities of a group or its members, through a quota or otherwise, because of race, color, sex, marital status, age, creed, religion, physical or mental handicap, or national origin.

49-2-308. Discrimination by the state. It is an unlawful discriminatory practice for the state or any of its political subdivisions:

(1) to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, creed, religion, sex, marital status, color, age, physical or mental handicap, or national origin, unless based on reasonable grounds;

(2) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any local, state, or federal funds, services, goods, facilities, advantages, or privileges of the office or agency will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, marital status, color, age, physical or mental handicap, or national origin or that the patronage of a person of a particular race, creed, religion, sex, marital status, color, age, or national origin or possessing a physical or mental handicap is unwelcome or not desired or solicited, unless based on reasonable grounds;

(3) to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his political beliefs. However, this prohibition does not apply to policymaking positions on the immediate staff of an elected officer of the executive branch provided for in Article VI, section 1, of the Montana constitution, to the appointment by the governor of a director of a principal department provided for in Article VI, section 7, of the Montana constitution, or to the immediate staff of the majority and minority leadership of the Montana legislature.

49-2-309. Discrimination in insurance and retirement plans. (1) It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.



(2) This section does not apply to any insurance policy, plan, coverage, or any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

49-2-310. Maternity leave -- unlawful acts of employers. It shall be unlawful for an employer or his agent to:

(1) terminate a woman's employment because of her pregnancy;

(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy;

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; or

(4) require that an employee take a mandatory maternity leave for an unreasonable length of time.

49-2-311. Reinstatement to job following pregnancy-related leave of absence. Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so. (1)

49-2-401. Procedure for claiming exemption. A person, educational institution, financial institution, or governmental entity or agency who or which seeks to be exempted from the requirements of part 3 of this chapter may petition the commission for a declaratory ruling as provided in 2-4-501 of the Montana Administrative Procedure Act. If the commission finds that reasonable grounds for granting an exemption exist, it may issue a ruling exempting the petitioner from the particular provision. This section, however, shall be strictly construed, and the burden is on the petitioner to demonstrate that an exemption should be granted.

49-2-402. "Reasonable" to be strictly construed. Any grounds urged as a "reasonable" basis for an exemption under any section of this chapter shall be strictly construed.

49-2-403. Specific limits on justification. (1) Sex, marital status, age, physical or mental handicap, race, creed, religion, color, or national origin may not comprise justification for discrimination unless the nature of the service requires the discrimination for the legally demonstrable purpose of correcting a previous discriminatory practice.

(2) Age or mental handicap may represent a legitimate

discriminatory criterion in credit transactions only as it relates to a person's capacity to make or be bound by contracts or other obligations.

49-2-404. Distinctions permitted for modesty or privacy. Separate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy.

49-2-501. Filing complaints. (1) A complaint may be filed by or on behalf of any person claiming to be aggrieved by any discriminatory practice prohibited by this chapter. The complaint must be in the form of a written, verified complaint stating the name and address of the person, educational institution, financial institution, or governmental entity or agency alleged to have engaged in the discriminatory practice and the particulars of the alleged discriminatory practice. The commission staff may file a complaint in like manner when a discriminatory practice comes to its attention.

(2) A complaint under this chapter must be filed with the commission within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. Any complaint not filed within the time set forth herein may not be considered by the commission.

49-2-502. Notification of and action by commission. The staff shall notify the commission in writing of all complaints filed with the commission. The commission shall meet a minimum of four times a year to hear and act upon all complaints filed.

49-2-503. Temporary relief by court order. (1) At any time after a complaint is filed under this chapter alleging an unlawful discriminatory practice, the commission may file a petition in the district court in the county in which the subject of the complaint occurs or in the county in which a respondent resides or transacts business seeking appropriate temporary relief against this practice, including an order restraining the respondent from interfering in any manner with an order the commission may enter with respect to the complaint.

(2) The court has the power to grant the temporary relief or restraining order it considers just and proper. However, no relief or order extending beyond 14 days may be granted except by consent of the respondent or upon a finding by the court that there is reasonable cause to believe that the respondent has engaged in discriminatory practices.

49-2-504. Informal settlement. The commission staff shall informally investigate the matters set out in a filed complaint promptly and impartially. If the staff determines that the allegations are supported by substantial evidence, it shall immediately try to eliminate the discriminatory practice by conference, conciliation, and persuasion.

49-2-505. Contested case hearing. (1) If the informal efforts to eliminate the alleged discrimination are unsuccessful, the staff shall inform the commission of the failure and the commission shall cause written notice to be served, together with a copy of the complaint, requiring the person, educational institution, financial institution, or governmental entity or agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission.

(2) The hearing must be held by the commission in the county where the unlawful conduct is alleged to have occurred unless the person, institution, entity, or agency charged in the complaint or the commission requests a change of venue for good cause shown. The case in support of the complaint may be presented before the commission by the staff, the complainant, or an attorney representing the complainant. The hearing and any subsequent proceedings under this chapter must be held in accordance with the Montana Administrative Procedure Act except as provided in 49-2-508.

(3) The commission may make provisions for defraying the expenses of an indigent party in a contested case hearing held pursuant to this chapter.

(4) The prevailing party in a hearing under this section may bring an action in district court for attorneys' fees. The court in its discretion may allow the prevailing party reasonable attorneys' fees. An action under this section must comply with the Montana Rules of Civil Procedure.

49-2-506. Procedure upon a finding of discrimination.

(1) If the commission finds that a person, institution, entity, or agency against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the commission shall order him or it to refrain from engaging in the discriminatory conduct. The order may:

(a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found;

(b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against;

(c) require a report on the manner of compliance.

(2) The order may not require the payment of any punitive damages.

(3) Whenever a commission order or conciliation agreement requires inspection by the commission staff for a period of time to determine if the respondent is complying with that order or agreement, the period of time may not be more than 3 years.

49-2-507. Procedure upon failure to find discrimination. If the commission finds that a person, institution, entity, or agency against whom or which a complaint was filed has not engaged in the discriminatory practice alleged in the complaint, it shall issue and cause to be served on the complainant an order dismissing the



complaint.

49-2-508. Injunction to enforce commission order. If the commission's order is not obeyed, the commission staff shall petition the district court in the county where the discriminatory practice occurred or in which the respondent resides or transacts business to enforce the commission's order by injunction.

49-2-509. Filing a complaint in district court. (1) The commission staff shall, at the request of either party, issue a letter entitling the complainant to file a discrimination action in district court if:

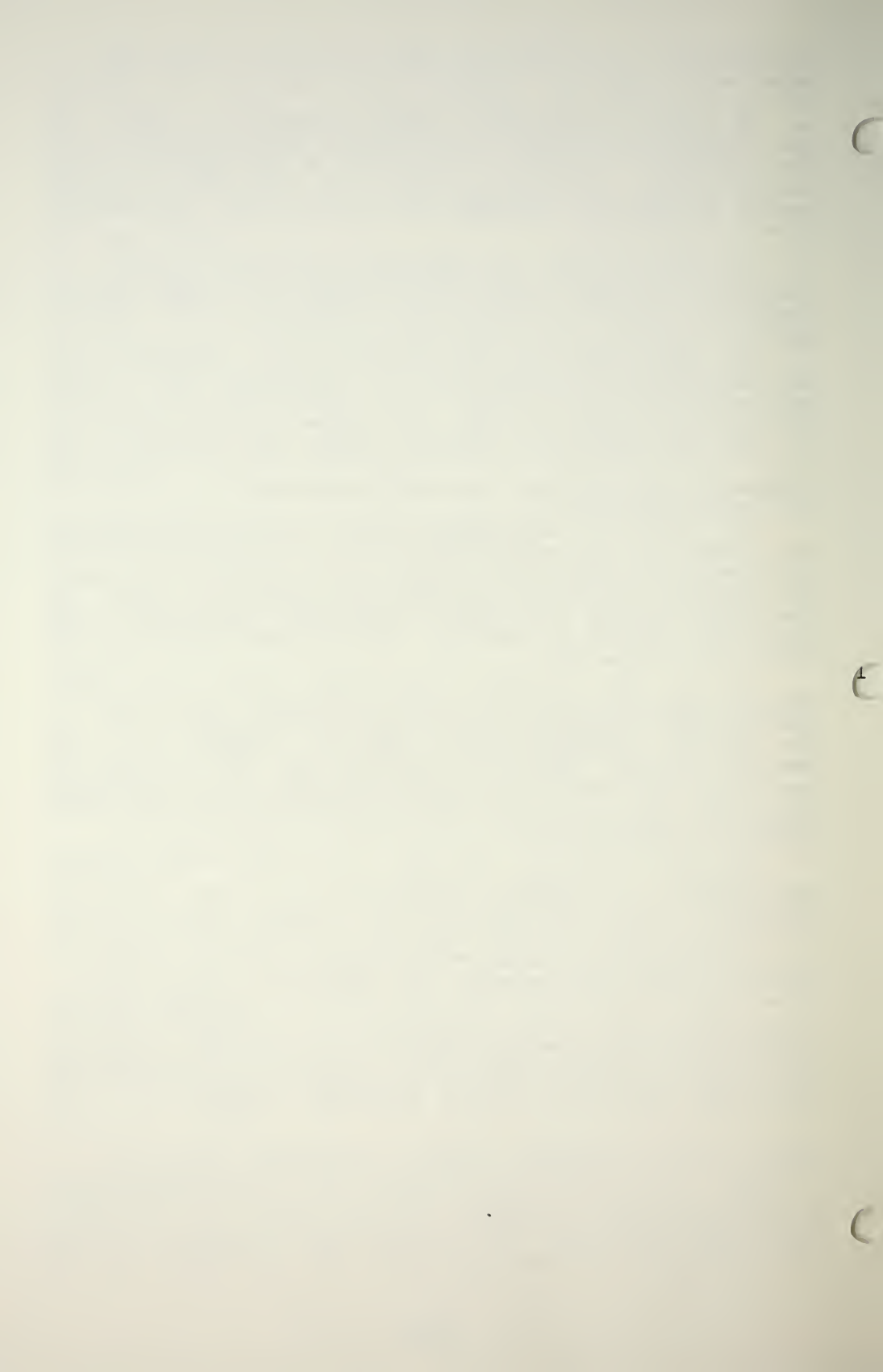
(a) the commission has not yet held a contested case hearing pursuant to 49-2-505 and has determined that it will be unable to hold a contested case hearing within 12 months of the date the complaint was filed under 49-2-501; and

(b) 180 days have elapsed since the complaint was filed and the efforts of the commission staff to settle the complaint after informal investigation pursuant to 49-2-504 have been unsuccessful.

(2) Within 90 days after receipt of a letter issued by the commission pursuant to subsection (1), the complainant shall petition the district court in the district in which the alleged violation occurred for appropriate relief. If the claimant fails to petition the district court within 90 days after receipt of a letter issued by the commission, the claim shall be barred.

(3) If the district court finds, in an action under this section, that a person, institution, entity, or agency against whom or which a complaint was filed has engaged in the unlawful discriminatory practice alleged in the complaint, the court may provide the same relief as described in 49-2-506 for a commission order. In addition, the court may in its discretion allow the prevailing party reasonable attorney fees.

49-2-601. Criminal penalty. A person, educational institution, or financial institution, either public or private, or a governmental entity or agency who or which willfully engages in an unlawful discriminatory practice prohibited by this chapter or willfully resists, prevents, impedes, or interferes with the commission, the department, or any of its authorized representatives in the performance of a duty under this chapter or who or which willfully violates an order of the commission or willfully violates this chapter in any other manner is guilty of a misdemeanor and is punishable by a fine of not more than \$500 or by imprisonment for not more than 6 months, or both.





# GOVERNMENTAL CODE OF FAIR PRACTICES

## Part 1 -- General Provisions

### Section

- 49-3-101. Definitions.
- 49-3-102. What local governmental units affected.
- 49-3-103. Permitted distinctions.
- 49-3-104. Quotas not required.
- 49-3-105. Procedure for claiming exemption.
- 49-3-106. Rulemaking authority.

## Part 2 -- Duties of Governmental Agencies and Officials

- 49-3-201. Employment of state and local government personnel.
- 49-3-202. Employment referrals and placement services.
- 49-3-203. Educational, counseling, and training programs.
- 49-3-204. Licensing.
- 49-3-205. Governmental services.
- 49-3-206. Distribution of governmental funds.
- 49-3-207. Nondiscrimination provision in all public contracts.
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## Part 3 -- Enforcement and Remedies

- 49-3-301. Cooperation with commission for human rights.
- 49-3-302. Annual reports to governor.
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- 49-3-304. Filing complaints.
- 49-3-305. Form of complaint.
- 49-3-306. Temporary relief by court order.
- 49-3-307. Informal settlement.
- 49-3-308. Contested case hearing before commission.
- 49-3-309. Procedure upon a finding of discrimination by commission.
- 49-3-310. Procedure upon failure by commission to find discrimination.
- 49-3-311. Injunction to enforce commission order.
- 49-3-312. Filing a complaint in district court.

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49-3-101. Definitions. As used in this chapter, the following definitions apply:

(1) "Age" means number of years since birth. It does not mean level of maturity or ability to handle responsibility, which may represent legitimate considerations as reasonable grounds for discrimination without reference to age.

(2) "Commission" means the commission for human rights

provided for in 2-15-1706.

(3) "Mental handicap" means any mental disability resulting in subaverage intellectual functioning or impaired social competence.

(4) "Physical handicap" means a physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including epilepsy. It includes without limitation any degree of paralysis; amputation; lack of physical coordination; blindness or visual impediment; deafness or hearing impediment; muteness or speech impediment; or physical reliance on a guide dog for the blind, a wheelchair, or any other remedial appliance or device.

(5) "State or local governmental agency" means:

(a) any branch, department, office, board, bureau, commission, agency, university unit, college, or other instrumentality of state government; or

(b) a county, city, town, school district, or other unit of local government and any instrumentality of local government.

(6) "Qualifications" means such qualifications as are genuinely related to competent performance of the particular occupational task.

49-3-102. What local governmental units affected.

Local governmental units affected by this chapter include all political subdivisions of the state, including school districts.

49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age;

(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) from discharging or otherwise disciplining an individual for good cause.

49-3-104. Quotas not required. Nothing in this chapter shall be construed as requiring the institution of a system of quotas for representation of any sex, age, religious, racial, ethnic, or other group affected by this chapter.

49-3-105. Procedure for claiming exemption. A state or local governmental agency seeking to apply any exemption from the requirements of this chapter may petition the commission for a declaratory ruling as provided in 2-4-501 of the Montana Administrative Procedure Act. If the commission finds that reasonable grounds for applying an

exemption exist, it may issue a ruling exempting the petitioner from the particular provision. The burden is on the petitioner to demonstrate that an exemption should be applied. Any provision in this chapter allowing an exemption from its requirements must be strictly construed.

49-3-106. Rulemaking authority. The commission may adopt rules necessary for the implementation of this chapter, in accordance with the Montana Administrative Procedure Act. The rules may include but are not limited to procedural rules for:

- (1) filing of complaints;
- (2) conducting investigations of complaints;
- (3) petitioning for a declaratory ruling, as provided in 49-3-105; and
- (4) conduct of hearings.

49-3-201. Employment of state and local government personnel. (1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons.

49-3-202. Employment referrals and placement services.

(1) All state and local governmental agencies, including educational institutions, which provide employment referrals or placement services to public or private employers shall accept job orders on a fair practice basis. A job request indicating an intention to exclude a person because of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin shall be rejected.

(2) All state and local governmental agencies shall cooperate in programs developed by the commission for human rights for the purpose of broadening the base of job recruitment and shall further cooperate with employers and unions providing such programs.

(3) The department of labor and industry shall cooperate with the commission for human rights in encouraging and enforcing compliance by employers and labor unions with the policy of this chapter and promotion of



equal employment opportunities.

49-3-203. Educational, counseling, and training programs. All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state and local governmental agencies or in which state and local governmental agencies participate must be open to all persons, who must be accepted on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin. Such programs must be conducted to encourage the full development of the interests, aptitudes, skills, and capacities of all students and trainees, with special attention to the problems of culturally deprived, educationally handicapped, or economically disadvantaged persons. Expansion of training opportunities under these programs must be encouraged to involve larger numbers of participants from those segments of the labor force in which the need for upgrading levels of skill is greatest.

49-3-204. Licensing. No state or local governmental agency may grant, deny, or revoke the license or charter of a person on the grounds of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin. Each state or local governmental agency shall take such appropriate action in the exercise of its licensing or regulatory power as will assure equal treatment of all persons, eliminate discrimination, and enforce compliance with the policy of this chapter.

49-3-205. Governmental services. (1) All services of every state or local governmental agency must be performed without discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) No state or local facility may be used in the furtherance of any discriminatory practice, nor may a state or local governmental agency become a party to an agreement, arrangement, or plan which has the effect of sanctioning discriminatory practices.

(3) Each state or local governmental agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of this chapter and shall initiate comprehensive programs to remedy any defect found to exist.

49-3-206. Distribution of governmental funds. Race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin may not be considered as limiting factors with regard to applicants' qualifications for benefits authorized by law in state or locally administered programs involving the distribution of funds; nor may state agencies provide grants, loans, or other financial assistance to public agencies, private institutions, or organizations which

engage in discriminatory practices.

49-3-207. Nondiscrimination provision in all public contracts. Every state or local contract or subcontract for construction of public buildings or for other public work or for goods or services shall contain a provision that all hiring must be on the basis of merit and qualifications and a provision that there may be no discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin by the persons performing the contract.

49-3-208. Public accommodations laws. No state or local governmental agency may permit any violation of the public accommodations provisions of 49-2-304.

49-3-209. Retaliation prohibited. It is an unlawful discriminatory practice for a state or local governmental agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

49-3-301. Cooperation with commission for human rights. All state and local governmental agencies shall cooperate with the commission for human rights in the commission's enforcement and educational programs. They shall comply with the commission's requests for information concerning practices inconsistent with the state policy against discrimination and shall consider its recommendations for effectuating and implementing that policy. The commission shall continue to augment its enforcement and educational programs which seek to eliminate all discrimination.

49-3-302. Annual reports to governor. All state governmental agencies which report to the governor shall include in their annual reports to the governor activities undertaken in the past year to effectuate this chapter. Such reports shall cover both internal activities and external relations with the public or with other state agencies and shall contain other information as specifically requested by the governor.

49-3-303. Repealed. Sec. 14, Ch. 540, L. 1983.

49-3-304. Filing complaints. A complaint under this chapter must be filed with the commission within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. A complaint not filed within that time may not be considered by the commission.

49-3-305. Form of complaint. A complaint filed with the commission must be in the form of a written, verified complaint, stating the name and address of the state or



local governmental agency alleged to have engaged in the discriminatory practice and the particulars of the alleged discriminatory practice.

49-3-306. Temporary relief by court order. (1) At any time after a complaint is filed with the commission under this chapter alleging an unlawful discriminatory practice, the commission may file a petition in the district court in the county in which the subject of the complaint occurred or in the county in which a respondent resides or transacts business, seeking appropriate temporary relief against this practice, including an order restraining the respondent from interfering in any manner with an order the commission may enter with respect to the complaint.

(2) The court has the power to grant the temporary relief or restraining order it considers just and proper. However, no relief or order extending beyond 14 days may be granted except by consent of the respondent or upon a finding by the court that there is reasonable cause to believe that the respondent has engaged in discriminatory practices.

49-3-307. Informal settlement. The commission staff shall promptly and impartially investigate the matters set out in a complaint filed with the commission. If the staff determines that the allegations are supported by substantial evidence, it shall immediately try to eliminate the discriminatory practice by informal conference, conciliation, and persuasion.

49-3-308. Contested case hearing before commission. (1) If the informal efforts to eliminate the discrimination alleged in a complaint filed with the commission are unsuccessful, the staff shall inform the commission of the failure and the commission shall serve written notice, together with a copy of the complaint, requiring the state or local governmental agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission.

(2) The commission hearing must be held in the county where the unlawful conduct is alleged to have occurred unless the state or local governmental agency charged in the complaint or the commission requests a change of venue for good cause shown. The case in support of the complaint may be presented before the commission by the commission staff, the complainant, or an attorney representing the complainant. The hearing and any subsequent proceedings under this chapter must be held in accordance with the Montana Administrative Procedure Act, except as provided in 49-3-311.

(3) The commission may make provisions for defraying the expenses of an indigent party in a contested case hearing held pursuant to this chapter.

(4) The prevailing party in a hearing under this section may bring an action in district court for attorney fees. The court in its discretion may award the prevailing party reasonable attorney fees. Such action must comply

with the Montana Rules of Civil Procedure.

49-3-309. Procedure upon a finding of discrimination by commission. (1) If the commission finds that a state or local governmental agency against which a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the commission shall order it to refrain from engaging in the discriminatory practice. The order may:

(a) prescribe conditions for the governmental agency's future conduct relevant to the type of discriminatory practice found;

(b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against; and

(c) require a report on the manner of compliance.

(2) The order may not require the payment of punitive damages.

(3) If a commission order or conciliation agreement requires inspection by the commission staff for a period of time to determine if the respondent is complying with the order or agreement, the period of time may not exceed 3 years.

49-3-310. Procedure upon failure by commission to find discrimination. If the commission finds that a state or local governmental agency against which a complaint was filed has not engaged in the discriminatory practice alleged in the complaint, it shall issue and serve on the complainant an order dismissing the complaint.

49-3-311. Injunction to enforce commission order. If the commission's order is not obeyed, the commission staff shall petition the district court in the county where the discriminatory practice occurred or in which the respondent resides or transacts business to enforce the commission's order by injunction.

49-3-312. Filing a complaint in district court. (1) The commission staff shall, at the request of either party, issue a letter entitling the complainant to file a discrimination action in district court if:

(a) the commission has not yet held a contested case hearing pursuant to 49-3-308 and has determined that it will be unable to hold a contested case hearing within 12 months of the date the complaint was filed under 49-3-304; and

(b) 180 days have elapsed since the complaint was filed and the efforts of the commission staff to settle the complaint after informal investigation pursuant to 49-3-307 are unsuccessful.

(2) Within 90 days after receipt of a letter issued by the commission pursuant to subsection (1), the complainant shall petition the district court in the district in which the alleged violation occurred for appropriate relief. If the claimant fails to petition the district court within 90 days after receipt of a letter issued by the commission, the complaint shall be barred.

(3) If the district court finds, in an action under

this section, that a state or local governmental agency against whom or which a complaint was filed has engaged in the unlawful discriminatory practice alleged in the complaint, the court may provide the same relief as described in 49-3-309 for a commission order. In addition, the court may in its discretion allow the prevailing party reasonable attorney fees.

# RIGHTS OF THE HANDICAPPED

## Part 1 -- Discrimination in Employment

### Section

49-4-101. Discrimination prohibited.

49-4-102. Penalty and civil remedy.

## Part 2 -- Rights of the Physically Disabled

49-4-201. Repealed.

49-4-202. Policy of the state.

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49-4-101. Discrimination prohibited. It is unlawful to discriminate, in hiring or employment, against a person because of the physical handicap of such person. There is no discrimination where the nature or extent of the handicap reasonably precludes the performance of the particular employment or where the particular employment may subject the handicapped or his fellow employees to physical harm.

49-4-102. Penalty and civil remedy. A person who practices discrimination in violation of 49-4-101 commits a misdemeanor and is also liable in a district court action for civil damages and attorney's fees by the person discriminated against. Should the person who allegedly practiced discrimination prevail in the civil action, he shall be entitled to recover reasonable attorney's fees from the person who alleged the discrimination.

49-4-201. Repealed. Sec. 11, Ch. 239, L. 1983.

49-4-202. Policy of the state. It is the policy of the state to encourage and enable the blind, the visually handicapped, the deaf, and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment. The blind, the visually handicapped, the deaf, and the otherwise physically disabled shall be employed in the state service, the service of the political subdivisions of the state, the public schools, and all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.





# STANDARDS OF CONDUCT

## Part 3 -- Nepotism

- 2-2-301. Nepotism defined.
- 2-2-302. Appointment of relative to office of trust or emolument unlawful.
- 2-2-303. Agreements to appoint relative to office unlawful.
- 2-2-304. Penalty for violation of nepotism law.

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2-2-301. Nepotism defined. Nepotism is the bestowal of political patronage by reason of relationship rather than of merit.

2-2-302. Appointment of relative to office of trust or emolument unlawful. (1) It shall be unlawful for any person or any member of any board, bureau, or commission or employee at the head of any department of this state or any political subdivision thereof to appoint to any position of trust or emolument any person related or connected by consanguinity within the fourth degree or by affinity within the second degree.

(2) The provisions of this section and 2-2-303 shall not apply to sheriffs in the appointment of persons as cooks and/or attendants.

2-2-303. Agreements to appoint relative to office unlawful. It shall further be unlawful for any person or any member of any board, bureau, or commission or employee of any department of this state or any political subdivision thereof to enter into any agreement or any promise with other persons or any members of any boards, bureaus, or commissions or employees of any department of this state or any of its political subdivisions thereof to appoint to any position of trust or emolument any person or persons related to them or connected with them by consanguinity within the fourth degree or by affinity within the second degree.

2-2-304. Penalty for violation of nepotism law. Any public officer or employee or any member of any board, bureau, or commission of this state or any political subdivision thereof who shall, by virtue of his office, have the right to make or appoint any person to render services to this state or any subdivision thereof and who shall make or appoint to such services or enter into any agreement or promise with any other person or employee or any member of any board, bureau, or commission of any other department of this state or any of its subdivisions to appoint to any position any person or persons related to him or them or connected with him or them by consanguinity within the fourth degree or by affinity within the second degree shall thereby be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not less than \$50 or

more than \$1,000 or by imprisonment in the county jail for  
not less than 6 months or by both such fine and  
imprisonment.

13-35-226. Unlawful acts of employers and employees.

(1) It is unlawful for any employer, in paying his employees the salary or wages due them, to include with their pay the name of any candidate or any political mottoes, devices, or arguments containing threats or promises (express or implied) calculated or intended to influence the political opinions or actions of the employees. It is unlawful for an employer to exhibit in a place where his workers or employees may be working any handbill or placard containing any threat, promise, notice, or information that in case any particular ticket or political party, organization, or candidate is elected, work in his place or establishment will cease, in whole or in part, or will be continued or increased; his place or establishment will be closed; the salaries or wages of his workers or employees will be reduced or increased; or other threats or promises (express or implied) intended or calculated to influence the political opinions or actions of his workers or employees. This section shall apply to corporations, individuals, and public officers and employees.

(2) No person may attempt to coerce, command, or require a public employee to support or oppose any political committee, the nomination or election of any person to public office, or the passage of a ballot issue.

(3) No public employee may solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at his place of employment. However, nothing in this section is intended to restrict the right of a public employee to express his personal political views.

(4) Any person who violates the provisions of this section shall be fined not to exceed \$1,000, be imprisoned in the county jail for a term not to exceed 6 months, or both, for each separate offense.



# **The Fair Labor Standards Act of 1938, as Amended**

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U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division

WH Publication 1318  
Revised February 1980



## THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED <sup>1</sup>

(29 U.S.C. 201, et seq.)

<sup>1</sup> This publication contains the original text of the Fair Labor Standards Act of 1938 as set forth in 52 Stat. 1060, revised to reflect the changes effected by the amendments listed in this footnote, which may be found in official text at the cited pages of the Statutes at Large.

This publication contains 52 Stat. 1060, as amended by:

(1)	The Act of August 9, 1939	53 Stat.	1266
(2)	Section 404 of Reorganization Plan No. II of 1939	53 Stat.	1436
(3)	Sections 3(c)-3(f) of the Act of June 26, 1940	54 Stat.	615
(4)	The Act of October 29, 1941	55 Stat.	756
(5)	Reorganization Plan No. 2 of 1946	60 Stat.	1095
(6)	The Portal-to-Portal Act of 1947	61 Stat.	84
(7)	The Act of July 20, 1949	63 Stat.	446
(8)	The Fair Labor Standards Amendments of 1949	63 Stat.	910
(9)	Reorganization Plan No. 6 of 1950	64 Stat.	1263
(10)	The Fair Labor Standards Amendments of 1955	69 Stat.	711
(11)	The American Samoa Labor Standards Amendments of 1956	70 Stat.	1118
(12)	The Act of August 30, 1957	71 Stat.	514
(13)	The Act of August 25, 1958	72 Stat.	844
(14)	Section 22 of the Act of August 28, 1958	72 Stat.	948
(15)	The Act of July 12, 1960	74 Stat.	417
(16)	The Fair Labor Standards Amendments of 1961	75 Stat.	65
(17)	The Equal Pay Act of 1963	77 Stat.	56
(18)	The Fair Labor Standards Amendments of 1966	80 Stat.	830
(19)	Section 8 of the Department of Transportation Act	80 Stat.	931
(20)	The Act of September 11, 1967, amending Title 5 of the U.S.C.	81 Stat.	222
(21)	Section 906 of the Education Amendments of 1972	86 Stat.	235
(22)	The Fair Labor Standards Amendments of 1974	88 Stat.	55
(23)	The Fair Labor Standards Amendments of 1977	91 Stat.	1245
(24)	Section 1225 of the Panama Canal Act of 1979	93 Stat.	468

The original text of the Fair Labor Standards Act of 1938, as revised by the amendments through 1960, is set in the "Century" typeface. Added or revised language as enacted by subsequent amendments is represented by several different typefaces as follows:

Amendments	Typeface Used	Public Law	Date Enacted	Statute Citation
Pre-1961	Century			
1961	Century Boldface	87-30	5/5/61	75 Stat. 65
1966	Century Italics	89-601	9/23/66	80 Stat. 830
1972	Century Boldface Italics	92-318	6/23/72	86 Stat. 235 at 375
1974	Century Boldface Italics	93-259	4/8/74	88 Stat. 55
1977	Helvetica Light	95-151	11/1/77	91 Stat. 1245

In cases where annual changes are to be made in provisions, as in the case of the gradual phase-out of exemptions, the changes are shown immediately following the provision to which they apply and are enclosed in brackets.

Changes made by the 1974 amendments are set in Century Boldface Italics. Those made by the 1977 amendments are set in Helvetica Light.

The footnotes in this revision show where prior changes have been made and refer to the specific amendments relied upon so that a comparison may be made with the official text.

This revised text has been prepared in the Office of the Solicitor, U.S. Department of Labor.

## FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED

(29 U.S.C. 201, et seq.)

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."*

### Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. *The Congress further finds that the employment of persons in domestic service in households affects commerce.*

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.<sup>2</sup>

### Definitions

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.<sup>3</sup>

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee *and includes a public agency,<sup>4</sup> but does not include* any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) *Except as provided in paragraphs (2) and (3), the term "employee" means* any individual employed by an employer.

(2) *In the case of an individual employed by a public agency, such term means—*

(A) *any individual employed by the Government of the United States—*

(i) *as a civilian in the military departments (as defined in section 102 of title 5, United States Code),*

(ii) *in any executive agency (as defined in section 105 of such title),*

(iii) *in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,*

(iv) *in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or*

(v) *in the Library of Congress;*

(B) *any individual employed by the United States Postal Service or the Postal Rate Commission; and*

(C) *any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—*

<sup>2</sup> As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

<sup>4</sup> Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to "employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (i) of this section, or (2) in the operation of a railway or carrier referred to in such sentence." \* \* \*

<sup>3</sup> As amended by section 2 of the Fair Labor Standards Amendments of 1949.

**Sec. 3(e)(2)(C)(i)**

*(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and*

*(ii) who—*

*(I) holds a public elective office of that State, political subdivision, or agency,*

*(II) is selected by the holder of such an office to be a member of his personal staff,*

*(III) is appointed by such an officeholder to serve on a policymaking level, or*

*(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.*

*(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.<sup>5</sup>*

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in

any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.<sup>6</sup>

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation,<sup>7</sup> or (2) any employee<sup>8</sup> between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor<sup>9</sup> shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor<sup>10</sup> certifying that such person is above the oppressive child labor age. The Secretary of Labor<sup>11</sup> shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor<sup>12</sup> determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor,<sup>13</sup> to the employer of furnishing such employee with

<sup>5</sup> Similar language was added to the Act by the Fair Labor Standards Amendments of 1966. Those amendments also excluded from the definition of employee "any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." These individuals are now included.

<sup>6</sup> As amended by section 3(b) of the Fair Labor Standards Amendments of 1949.

<sup>7</sup> As amended by section 3(c) of the Fair Labor Standards Amendments of 1949.

<sup>8</sup> Reorganization Plan No. 2 of 1948 provided that the functions of the Children's Bureau and of the Chief of the Children's Bureau under the Act as originally enacted be transferred to the Secretary of Labor.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> As amended by Reorganization Plan No. 6 of 1950 set out under section 4(a).



Sec. 3(m)

board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. *In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.*

[Effective January 1, 1979, section 3(m) is amended by striking out "50 per centum" and inserting in lieu thereof "45 per centum".]

Effective January 1, 1980, section 3(m) is amended by striking out "45 per centum" and inserting in lieu thereof "40 per centum".]

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.<sup>13</sup>

(o) Hours worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide

collective-bargaining agreement applicable to the particular employee.<sup>14</sup>

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. *For purposes of this subsection, the activities performed by any person or persons—*

*(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool,<sup>15</sup> elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or*

*(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not*

<sup>13</sup> <sup>14</sup> Section 3(d) of the Fair Labor Standards Amendments of 1949. (The original language of section 3(n) was restored by the Fair Labor Standards Amendments of 1966.)

<sup>15</sup> "A preschool" was added by the Education Amendments of 1972.

**Sec. 3(r)(2)**

*such railway or carrier is public or private or operated for profit or not for profit), or*

*(3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.*

*(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—*

*(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level which are separately stated)<sup>16</sup> or is a gasoline service establishment whose annual gross volume of sales is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2), whose annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated);*

*(2) is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 13(a)(2), and whose annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than \$275,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than \$325,000 (exclusive of excise taxes at the retail level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not*

*less than \$362,500 (exclusive of excise taxes at the retail level which are separately stated).<sup>17</sup>*

*(3) is engaged in laundering, cleaning, or repairing clothing or fabrics;<sup>18</sup>*

*(4) is engaged in the business of construction or reconstruction, or both;<sup>19</sup>*

*(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a pre-school,<sup>20</sup> elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit);<sup>21</sup> or*

*(6) is an activity of a public agency.*

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 6(a)(1), and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its

<sup>16</sup> As added by section 9(a) of the Fair Labor Standards Amendments of 1977, effective November 1, 1977. Prior to those amendments, paragraphs (3), (4), (5) and (6) of section 3(a) were numbered (2), (3), (4) and (5), respectively.

<sup>17</sup> Prior to the Fair Labor Standards Amendments of 1966, the Act's minimum wage and overtime requirements did not generally apply to employees of laundry or dry cleaning establishments, even if such establishments were part of a covered enterprise, because of the language in section 13(a)(3) (since repealed) which exempted "any employee employed by an establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located. Provided, that 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communication business."

<sup>18</sup> See footnote 15.

<sup>19</sup> Prior to the Fair Labor Standards Amendments of 1966, the Act's minimum wage and overtime requirements did not apply to most of the establishments listed in this subsection, because section 13(a)(2)(iii), as it then read, exempted employees of a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children. Public schools were also exempt by virtue of the Act's definition of the word "employer," which, prior to 1966, excluded States and their political subdivisions.

<sup>16</sup> Prior to the Fair Labor Standards Amendments of 1966, the dollar volume test for enterprise coverage (except in the case of an enterprise engaged in construction or reconstruction or one which was a gasoline service establishment) was \$1,000,000. The dollar volume test was \$350,000 for a construction or reconstruction enterprise, and \$250,000 for a gasoline service establishment. In addition, enterprises with one or more retail or service establishments, in order to be covered, had to purchase or receive "goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to \$250,000 or more." Finally, under the 1961 Amendments, enterprises (except those engaged in construction or reconstruction, or in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, or gasoline service establishments) were covered only with respect to those establishments "which ha[d] employees engaged in commerce or in the production of goods for commerce."



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annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employees in accordance with section 7. A violation of the preceding sentence shall be considered a violation of section 6 or 7, as the case may be.

(t) "*Tipped employee*" means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.<sup>22</sup>

(u) "*Man-day*" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "*Elementary school*" means a day or residential school which provides elementary education, as determined under State law.

(w) "*Secondary school*" means a day or residential school which provides secondary education, as determined under State law.

(x) "*Public agency*" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

Administration<sup>23</sup>

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$36,000<sup>24</sup> a year.

*Excerpts From Reorganization Plan No. 6 of 1950, 64 Stat. 1263*

"Except as otherwise provided [with respect to hearing examiners], there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department \* \* \*. The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or

by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

(b) The Secretary of Labor<sup>25</sup> may, subject to the civil service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1949<sup>26</sup> as amended. The Secretary<sup>27</sup> may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Secretary<sup>28</sup> in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Secretary,<sup>29</sup> no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Secretary<sup>30</sup> shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d)(1) The Secretary<sup>31</sup> shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages and overtime coverage established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.<sup>32</sup> *Such report shall also include a summary of the special certificates issued under section 14(b).*

(2) *The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions*

<sup>25</sup> As amended by section 404 of Reorganization Plan No. 11 of 1939 (53 Stat. 1436) and by Reorganization Plan No. 6 of 1950 (64 Stat. 1263).

<sup>26</sup> As amended by section 1104 of the Act of October 23, 1949 (63 Stat. 972).

<sup>27</sup> See footnote 25.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> As amended by Reorganization Plan No. 6 of 1950.

<sup>31</sup> Ibid.

<sup>32</sup> Section 2 of the Fair Labor Standards Amendments of 1955.

<sup>22</sup> As amended by section 3(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. Prior to January 1, 1978, the dollar amount was \$20.

<sup>23</sup> Heading revised to reflect changes made by Reorganization Plan No. 6 of 1950.

<sup>24</sup> Executive Order 11811 of October 7, 1974.

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set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided*, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to

bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.

Special Industry Committees for Puerto Rico and the Virgin Islands

SEC. 5. <sup>33</sup> (a) The Secretary of Labor <sup>34</sup> shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce, or the Secretary <sup>35</sup> may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees <sup>36</sup> shall be subject to the provisions of section 8.

(b) An industry committee shall be appointed by the Secretary <sup>37</sup> without any regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Secretary <sup>38</sup> shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Secretary <sup>39</sup> shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the

<sup>33</sup> Section 5 as amended by section 3(c) of the Act of June 26, 1940 (54 Stat. 615); by section 5 of the Fair Labor Standards Amendments of 1949; by section 4 of the Fair Labor Standards Amendments of 1961; by section 5 of the Fair Labor Standards Amendments of 1974, and as further amended as noted. Paragraphs (b), (c), and (d) (except for the substitution of "Secretary" for "Administrator") read as in the original Act.

<sup>34</sup> See footnote 30.

<sup>35</sup> *Ibid*.

<sup>36</sup> As amended by section 5(a) of the Fair Labor Standards Amendments of 1955.

<sup>37</sup> See footnote 30.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

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committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Secretary<sup>40</sup> shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Secretary<sup>41</sup> shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Secretary<sup>42</sup> shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Secretary<sup>43</sup> to furnish additional information to aid it in its deliberations.

(e) *The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term "State" does not include a territory or possession of the United States.*

Minimum Wages

SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than \$2.65 an hour during the year beginning January 1, 1978, not less than \$2.90 an hour during the year beginning January 1, 1979, not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2)<sup>44</sup> if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor,<sup>45</sup> or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;<sup>46</sup>

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Paragraph number changed from (5) to (2) by section 6(b) of the Fair Labor Standards Amendments of 1949.

<sup>45</sup> See footnote 30.

<sup>46</sup> Section 3(f) of the Act of June 26, 1940 (54 Stat. 616).



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respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;<sup>47</sup>

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c) <sup>48</sup>(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1).

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is

at least \$2 an hour shall, except as provided in paragraph (3), be increased—

(i) effective January 1, 1978, by \$0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 8, and

(ii) effective January 1, 1979, and January 1 of each succeeding year, by \$0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than \$2 an hour shall, except as provided in paragraph (3), be increased—

(i) effective January 1, 1978, by \$0.20 an hour or by such greater amount as may be recommended by a special industry committee under section 8, and

(ii) effective January 1, 1979, and January 1 of each succeeding year—

(I) until such wage order rate is not less than \$2.30 an hour, by \$0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate is not less than \$2.30 an hour, by \$0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) of this section would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by subparagraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under subsection (a)(1) shall apply to such employee.

(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued

<sup>47</sup> Section 2 of the American Samoa Labor Standards Amendments of 1956, as amended by section 5 of the Fair Labor Standards Amendments of 1963.

<sup>48</sup> The Fair Labor Standards Amendments of 1977 amended subsection (c) of the Act by deleting former paragraphs (2), (3) and (4) thereof, by adding a new paragraph (2), and by redesignating former paragraphs (5) and (6) as paragraphs (3) and (4), respectively.

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(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

\* (1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

\* (2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or

two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3)<sup>51</sup> by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6, and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) \* \* \* (Repealed)

[Note: Section 7(c) (relating to employers employing employees in an industry found by the Secretary to be of a seasonal nature) was repealed by Section 19 of the Fair Labor Standards Amendments of 1974, effective December 31, 1976.]

(d) \* \* \* (Repealed)

[Note: Section 7(d) (relating to employers who do not qualify for the exemption in subsection (c) who employ employees in an industry found by the Secretary "(A) to be characterized by marked annual recurring peaks of operation \* \* \*, or (B) to be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state \* \* \*") was repealed by Section 19 of the Fair Labor Standards Amendments of 1974, effective December 31, 1976.]

<sup>51</sup> Section 212 of the Fair Labor Standards Amendments of 1966 substituted this provision for the complete exemption from overtime contained in former section 13(b)(10) enacted in the 1961 amendments. Former clause (3) of section 7(b) as enacted in the 1938 Act was replaced by new section 7(c) as enacted by section 204(c) of the Fair Labor Standards Amendments of 1966.



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by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate.

(d)<sup>49</sup> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) (1) *Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable,*

wages at rates not less than the rates provided for in subsection (b) of this section.

(2) *Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.*

(f) *Any employee—*

(1) *who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or*

(2) *who in any workweek—*

(A) *is employed in domestic service in one or more households, and*

(B) *is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b).*

Maximum Hours

SEC. 7.<sup>50\*</sup> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

<sup>49</sup> Section 7 as amended by section 7 of the Fair Labor Standards Amendments of 1949, and as further amended as noted. Single asterisk (\*) indicates provision amended by the 1949 Act; double asterisk (\*\*) indicates provision added by the 1949 Act. Bold face type indicates amendment made by the Fair Labor Standards Amendments of 1961. Italic type indicates amendment made by the Fair Labor Standards Amendments of 1966. Bold face italic type indicates amendment made by the Fair Labor Standards Amendments of 1974. Helvetica light type indicates amendment made by the Fair Labor Standards Amendments of 1977.

<sup>50</sup> Subsection (d) added by Equal Pay Act of 1963, 77 Stat. 56 (effective on and after June 11, 1963 except for employees covered by collective bargaining agreements in certain cases).

Sec. 7(e)

**\*\* (e)** As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

**\*\* (1)** sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

**\*\* (2)** payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

**\*\* (3)** sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor <sup>52</sup> set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary <sup>53</sup>) paid to performers, including announcers, on radio and television programs;

**\*\* (4)** contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

**\*\* (5)** extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the em-

ployee's normal working hours or regular working hours, as the case may be;

**\* (6)** extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;<sup>54</sup> or

**\* (7)** extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.<sup>55</sup>

**\*\* (f)** No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**\*\* (g)** No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

<sup>52</sup> See footnote 30.  
<sup>53</sup> Ibid.

<sup>54</sup> Paragraphs (6) and (7) together with section 7(b) continue in effect provisions of section 1 of the Act of July 20, 1949 (63 Stat. 446), which Act was repealed as of the effective date of the Fair Labor Standards Amendments of 1949.

<sup>55</sup> Ibid.

Sec. 7(g)(1)

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during non-overtime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor<sup>56</sup> as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

\**(h)* Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.<sup>57</sup>

*(i)* No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. *In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.*

*(j)* No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

*(k)*<sup>58</sup> No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

*(1)* in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to Section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

*(2)* in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

*(l)* No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

<sup>56</sup> Effective January 1, 1975, the complete overtime exemption provided by section 6(c)(2)(A) of the Fair Labor Standards Amendments of 1974 was replaced by the more limited exemption in section 7(k). The present overtime standard—the lesser of 216 hours or the average number of hours (as determined by the Secretary of Labor) in tours of duty of employees in work periods of 28 consecutive days—became effective on January 1, 1978. During calendar year 1977 the overtime standard was 216 hours, during 1976 the overtime standard was 232 hours, and during 1975 the overtime standard was 240 hours. The complete overtime exemption remains applicable only to public agencies employing less than 5 employees in fire protection or law enforcement activities. See section 13(b)(20), *infra*.

<sup>57</sup> See footnote 30.

<sup>58</sup> Amendment provided by section 7 of the Fair Labor Standards Amendments of 1949. See also footnote 54.



Sec. 7(m)

(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

Wage Orders in Puerto Rico and the Virgin Islands

SEC. 8.<sup>59</sup> (a) The policy of this Act with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the *minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)*. The Secretary shall, from time to time, convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee—

(1) shall, from time to time, recommend the minimum wage rates to be paid by employers who are in Puerto Rico, in the Virgin Islands, or in both places and who but for section 6(c) would be subject to the minimum wage requirements of section 6(a)(1), and

(2) may, from time to time, recommend increases in the incremental increases authorized by section 6(c)(2). The Secretary of Labor<sup>60</sup> shall from time to time convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce in any such industry or classification therein. Minimum rates of wages established in accordance with this section which are not equal to the *otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)* shall be reviewed by such a Committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary,<sup>61</sup> in his discretion, may order an additional review during any such biennial period.<sup>62</sup>

(b) Upon the convening of any such industry committee, the Secretary<sup>63</sup> shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate condi-

<sup>59</sup> Section 8 as amended by section 8 of the Fair Labor Standards Amendments of 1949; by section 7 of the Fair Labor Standards Amendments of 1961; by section 5(d) of the Fair Labor Standards Amendments of 1974; by section 2(d)(3) of the Fair Labor Standards Amendments of 1977; and as further amended as noted. Paragraphs (b), (c), (d), (e), and (f) as amended by the 1949 Act read substantially the same as paragraphs (b) and (c) (except for the parenthetical reference to the minimum wage rate provided in section 6 (a), (d), (f), and (g) in the original Act).

<sup>60</sup> See footnote 30.

<sup>61</sup> Act of August 25, 1958 (72 Stat. 844).

<sup>62</sup> As amended by Act of August 25, 1958 (72 Stat. 844).

<sup>63</sup> See footnote 30.

## Sec. 8(b)

tions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. <sup>64</sup> The committee shall recommend to the Secretary <sup>65</sup> the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands; *except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage.*

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that in effect under paragraph (1) or (5) of section 6(a) (as the case may be)) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee <sup>66</sup> shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements nego-

tiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication. <sup>67</sup>

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Secretary <sup>68</sup> finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. <sup>69</sup>

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Secretary <sup>70</sup> deems reasonably calculated to give general notice to interested persons.

## Attendance of Witnesses

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor <sup>71</sup> and the industry committees.

## Court Review

SEC. 10. <sup>72</sup> (a) Any person aggrieved by an order of the Secretary issued under section 8 may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his

<sup>64</sup> Ibid.

<sup>65</sup> See footnote 30.

<sup>66</sup> As amended by section 5(e) of the Fair Labor Standards Amendments of 1955.

<sup>67</sup> See footnote 30.

<sup>68</sup> Ibid.

<sup>69</sup> Section 10(a) as amended by section 5(f) of the Fair Labor Standards Amendments of 1955, and as further amended as noted.

<sup>64</sup> As amended by section 5(b) of the Fair Labor Standards Amendments of 1955.

<sup>65</sup> See footnote 30.

<sup>66</sup> As amended by sections 5(c) and 5(d) of the Fair Labor Standards Amendments of 1955 (eliminating review by the Secretary of Labor of the recommendations of the industry committee).



Sec. 10(a)

principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify (*including provision for the payment of an appropriate minimum wage rate*), or set aside such order in whole or in part, so far as it is applicable to the petitioner.<sup>73</sup> The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Secretary's<sup>74</sup> order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to

the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

Investigations, Inspections, Records, and Homework Regulations

SEC. 11. (a) The Secretary of Labor<sup>75</sup> or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Secretary<sup>76</sup> shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Secretary<sup>77</sup> shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Secretary of Labor<sup>78</sup> may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Secretary<sup>79</sup> as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> See footnotes 8 and 30.

<sup>77</sup> See footnote 30.

<sup>73</sup> Section 22 of the Act of August 28, 1958 (72 Stat. 948).

<sup>74</sup> See footnote 30.

Sec. 11(d)

(d) The Secretary is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.<sup>80</sup>

Child Labor Provisions

SEC. 12. (a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.<sup>81</sup>

(b) The Secretary of Labor,<sup>82</sup> or any of his authorized representatives, shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.<sup>83</sup>

*(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.*

Exemptions

SEC. 13.<sup>84</sup> (a) The provisions of sections 6 (*except section 6(d) in the case of paragraph (1) of this subsection*)<sup>85</sup> and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (*including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools*), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) any employee employed by any retail or service establishment (*except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(5)*), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s).<sup>86</sup> A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;<sup>87</sup> or

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center,<sup>88</sup> if (A) it does not operate for more

<sup>80</sup> Section 13 as amended by section 11 of the Fair Labor Standards Amendments of 1949; by Reorganization Plan No. 6 of 1950; and as further amended by the Fair Labor Standards Amendments of 1961, 1966, 1974, and 1977.

<sup>81</sup> As amended by the Education Amendments of 1972, 86 Stat. 235 at 375, effective July 1, 1972.

<sup>82</sup> Effective January 1, 1977, the Fair Labor Standards Amendments of 1974 deleted a clause at the end of this sentence which had read "or such establishment has an annual dollar volume of sales which is less than \$200,000 exclusive of excise taxes at the retail level which are separately stated." The \$200,000 test was in effect during calendar year 1976. A \$225,000 test was in effect during calendar year 1975. Prior to January 1, 1975 a \$250,000 test was in effect.

<sup>83</sup> See section 13(g), which makes additional limitations on the applicability of the section 13(a)(2) and section 13(a)(6) exemptions to certain conglomerates.

<sup>84</sup> Added by section 11 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

<sup>85</sup> Section 9 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950.

<sup>86</sup> As amended by section 10(a) of the Fair Labor Standards Amendments of 1949.

<sup>87</sup> See footnotes 8 and 30.

<sup>88</sup> Section 10(b) of the Fair Labor Standards Amendments of 1949 as amended by section 8 of the Fair Labor Standards Amendments of 1961.

Sec. 13(a)(3)

than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 6 and 7 provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 6, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture;<sup>89</sup> or

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thir-

teen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock;<sup>90</sup> or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 14; or

(8)<sup>91</sup> any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) \* \* \* (Repealed)

[*Note: Section 13(a)(9) (relating to motion picture theater employees) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in section 13(b)(27).]*

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) \* \* \* (Repealed)

[*Note: Section 13(a)(11) (relating to telegraph agency employees) was repealed by section 10 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption from the overtime provisions only in section 13(b)(23), which was repealed effective May 1, 1976.*]

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13) \* \* \* (Repealed)

[*Note: Section 13(a)(13) (relating to small logging crews) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amend-*

<sup>89</sup> The last clause of section 13(a)(3) of the Act was added by section 4(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. See also section 13(b)(29) of the Act, as added by the 1977 Amendments.

<sup>90</sup> Prior to the Fair Labor Standards Amendments of 1966, the section 13(a)(6) exemption was applicable to all agricultural employees. For additional changes made by the Fair Labor Standards Amendments of 1974, see footnote 87.

<sup>91</sup> As amended by the Fair Labor Standards Amendments of 1966 (which deleted the words "printed and" which formerly preceded the word "published").



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ments created an exemption for such employees from the overtime provisions only in Section 13(b)(28).]

(14) \* \* \* (Repealed)

[Note: Section 13(a)(14) (relating to employees employed in growing and harvesting of shade grown tobacco) was repealed by section 9 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for certain tobacco producing employees from the overtime provisions only in section 13(b)(22). The section 13(b)(22) exemption was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

(b) The provisions of section 7 shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation<sup>92</sup> has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or

(4) \* \* \* (Repealed)

[Note: Section 13(b)(4) (relating to employees in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof) was repealed, effective May 1, 1976, by section 11 of the Fair Labor Standards Amendments of 1974.]

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) \* \* \* (Repealed)

[Note: Section 13(b)(7) (relating to any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or

interurban electric railway, or local trolley or motor-bus carrier) was repealed, effective May 1, 1976, by section 21 of the Fair Labor Standards Amendments of 1974.]<sup>93</sup>

(8) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is employed by an establishment which is a hotel, motel, or restaurant<sup>94</sup> and who receives compensation for employment in excess of forty-four hours<sup>95</sup> in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or  
[Effective January 1, 1979, such section is repealed.]

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;<sup>96</sup> or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated

<sup>92</sup> Prior to the Fair Labor Standards Amendments of 1966, employees of local transit companies were exempt from both the Act's minimum wage and overtime requirements.

<sup>93</sup> The portion of section 13(b)(8) pertaining to "an institution (other than a hospital) primarily engaged in the care of the sick, the aged or the mentally ill or defective" was deleted by the 1974 Amendments as provision was made for such establishments in section 7(j). Former subparagraph (B) of section 13(b)(8), relating to hotel or motel employees performing maid or custodial services, was repealed, effective May 1, 1977, by the Fair Labor Standards Amendments of 1974. Prior to the Fair Labor Standards Amendments of 1966, all hotel, motel and restaurant employees were exempt from both the Act's minimum wage and overtime requirements.

<sup>94</sup> As amended by section 14(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. From May 1, 1975, through December 31, 1977, the overtime standard for such employees was 46 hours. From May 1, 1974, through April 30, 1975, the standard was 48 hours.

<sup>95</sup> Boats were added by the Fair Labor Standards Amendments of 1974. Prior to these Amendments, the overtime exemption in subsection (B) also applied to partmen and mechanics. An earlier minimum wage exemption for any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks or farm implements was repealed by the Fair Labor Standards Amendments of 1966.

<sup>94</sup> As amended by the Department of Transportation Act, 80 Stat. 931, which substituted "Secretary of Transportation" for "Interstate Commerce Commission".

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for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a); or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agriculture purposes;<sup>97</sup> or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1);<sup>98</sup> or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations;<sup>99</sup> or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup;<sup>100</sup> or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables;<sup>101</sup> or

(17) any driver employed by an employer engaged in the business of operating taxicabs;<sup>102</sup> or

(18) \* \* \* (Repealed)

[Note: Section 13(b)(18) (relating to any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs) was repealed, effective May 1, 1976, by section 15 of the Fair Labor Standards Amendments of 1974.]<sup>103</sup>

(19) \* \* \* (Repealed)

[Note: Section 13(b)(19) (relating to any employee of a bowling establishment) was repealed, effective May 1, 1976, by section 16 of the Fair Labor Standards Amendments of 1974.]

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be;<sup>104</sup> or

[Note: Section 6(c)(3) of the Fair Labor Standards Amendments of 1974 provided as follows: "The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register."]

<sup>97</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1966.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> The exemption applicable to the ginning of cotton and the processing of sugar beets and sugar cane was deleted from section 13(b)(15) by the Fair Labor Standards Amendments of 1974 and provision was made for such employees in sections 13(b)(25) and 13(b)(26). The exemptions in sections 13(b)(25) and 13(b)(26) were repealed, effective January 1, 1978, by the Fair Labor Standards Amendments of 1977, and provision was made for such employees in sections 13(i) and 13(j), which were added to the Act by those Amendments.

<sup>101</sup> See footnote 97.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Prior to January 1, 1975, section 13(b)(20) exempted "any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions)." A partial overtime exemption for public agencies having 5 or more such employees is provided by section 7(k) of the Act.



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(21) *any employee who is employed in domestic service in a household and who resides in such household; or*

(22) \* \* \* (Repealed)

[Note: Section 13(b)(22) (relating to employees employed in the growing and harvesting of shade grown tobacco <sup>105</sup>) was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(23) \* \* \* (Repealed)

[Note: Section 13(b)(23) (relating to any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), who is engaged in handling telegraphic messages for the public <sup>106</sup>) was repealed, effective May 1, 1976, by section 10 of the Fair Labor Standards Amendments of 1974.]

(24) *any employee who is employed with his spouse by a non-profit educational institution to serve as the parents of children—*

(A) *who are orphans or one of whose natural parents is deceased, and* <sup>107</sup>

(B) *who are enrolled in such institution and reside in residential facilities of the institution, while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than \$10,000; or*

(25) \* \* \* (Repealed)

[Note: Section 13(b)(25) (relating to any employee engaged in ginning cotton for market in any place of employment located in a county where cotton is grown in commercial quantities <sup>108</sup>) was repealed by section 6(a) of the Fair Labor Standards Amendments of 1977, and is replaced by new section 13(i), added by section 6(b) of those Amendments, which provides a more limited overtime exemption for such employees. Both changes were effective January 1, 1978.]

(26) \* \* \* (Repealed)

[Note: Section 13(b)(26) (relating to any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup was repealed by section 7(a) of

the Fair Labor Standards Amendments of 1977, and is replaced by new section 13(j), added by section 7(b) of those Amendments, which provides a more limited overtime exemption for such employees. Both changes were effective January 1, 1978.]

(27) *any employee employed by an establishment which is a motion picture theater;* <sup>109</sup> *or*

(28) *any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;* <sup>110</sup> *or*

(29) <sup>111</sup> *any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.*

(c)(1) *Except as provided in paragraphs (2) or (4), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—*

(A) *is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5),*

(B) *is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or*

(C) *is fourteen years of age or older.*

<sup>105</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1974.

<sup>106</sup> *Ibid.*

<sup>107</sup> The word "and" is substituted for the word "or" pursuant to 120 Cong. Rec. H2297 (March 28, 1974, statement of Congressman Dent).

<sup>108</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1966.

<sup>109</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1974.

<sup>110</sup> *Ibid.*

<sup>111</sup> Added by section 4(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

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(2) *The provisions of section 12 relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.*

(3) *The provisions of section 12 relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.*

(4) <sup>112</sup> (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 12 to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 12 would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(d) The provisions of sections 6, 7, and 12 shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) The provisions of section 7 shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 6(a)(3), except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 7 if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 6(a)(3), that economic conditions warrant such action.<sup>113</sup>

(f) The provisions of sections 6, 7, 11, and 12 shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.<sup>114</sup>

(g) *The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2)*

<sup>112</sup> Section 3 of the American Samoa Labor Standards Amendments of 1956.

<sup>113</sup> As added by section 8 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

<sup>114</sup> Section 1(1) of the Act of August 30, 1957 (71 Stat. 514), as amended by section 21(b) of the Act of July 12, 1960 (74 Stat. 417), and by section 213 of the Fair Labor Standards Amendments of 1966, and by Section 1225 of the Panama Canal Act of 1979 (93 Stat. 468).

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*whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).*

*(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—*

*(1) is employed by such employer—*

*(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;*

*(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;*

*(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed;*

*(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and*

*(2) receives for—*

*(A) such employment by such employer which is in excess of ten hours in any workday, and*

*(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.*

*Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.*

*(i) <sup>115</sup> The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—*

*(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and*

*(2) receives for any such employment during such workweeks—*

*(A) in excess of ten hours in any workday, and*

*(B) in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.*

*(j) <sup>116</sup> The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—*

*(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and*

*(2) receives for any such employment during such workweeks—*

*(A) in excess of ten hours in any workday, and*

*(B) in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.*

**Learners, Apprentices, Students, and Handicapped Workers**

*Sec. 14.<sup>117</sup> (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.*

*(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for em-*

<sup>115</sup> Added by section 6(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

<sup>116</sup> Added by section 7(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

<sup>117</sup> As amended by section 24 of the Fair Labor Standards Amendments of 1974.



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ployment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than \$1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment, whichever is greater;

(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month

period immediately prior to the effective date of such Amendments,

(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment, whichever is greater; or

(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establishment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term "student hours of employment" means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than \$1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than \$1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in sec-

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tion 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

(B)<sup>118</sup> If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed six, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed six—

(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued

under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate.

(D)<sup>119</sup> To minimize paperwork for, and to encourage, small businesses to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order, prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students. Such an application shall require only—

(i) a listing of the name, address, and business of the applicant employer,

(ii) a listing of the date the applicant began business, and

(iii) the certification that the employment of such full-time students will not reduce the full-time employment opportunities of persons other than persons employed under special certificates.

(c)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

<sup>118</sup> As amended by section 12 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977. The 1977 amendments substituted "six" for "four."

<sup>119</sup> Added by section 13 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.



*Sec. 14(c)(2)(B)*

*(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,*

*at wages which are less than those required by this subsection and which are related to the worker's productivity.*

*(3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.*

*(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.*

*(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.*

**Prohibited Acts**

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor<sup>120</sup> issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who

acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;<sup>121</sup>

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary<sup>122</sup> issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.<sup>123</sup>

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

**Penalties<sup>124</sup>**

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime com-

<sup>121</sup> As amended by section 13(a) of the Fair Labor Standards Amendments of 1949  
<sup>122</sup> See footnote 30.

<sup>123</sup> As amended by section 13(b) of the Fair Labor Standards Amendments of 1949

<sup>124</sup> The Portal-to-Portal Act of 1947 relieves employers from certain liabilities and punishments under this Act in circumstances specified in that Act.

<sup>120</sup> See footnote 30.

Sec. 16(b)

pensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation, employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained *against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.* No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.<sup>125</sup> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. *The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).*<sup>126</sup>

(c) The Secretary<sup>127</sup> is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of *the unpaid minimum wages or*

*overtime compensation and an equal amount as liquidated damages.*<sup>128</sup> *The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary.* Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the statutes<sup>129</sup> of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.<sup>130</sup>

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 6(a) (3) at any time prior to the establishment by the Secre-

<sup>125</sup> Amendment provided by section 5(a) of the Portal-to-Portal Act of 1947.

<sup>126</sup> The Fair Labor Standards Amendments of 1971 amended subsection 16(b), effective January 1, 1978, to authorize a private right of action for violations of subsection 15(a)(3) of the Act. Prior to this amendment, only the Secretary of Labor was authorized to bring an action for violations of subsection 15(a)(3).

<sup>127</sup> See footnote 10.

<sup>128</sup> The provision for liquidated damages was added by the Fair Labor Standards Amendments of 1974. These Amendments also deleted the prior requirements that section 16(c) suits be brought only on the written request of the employee and if the case did not involve any issue of law which had not been finally settled by the courts.

<sup>129</sup> Amended by section 601 of the Fair Labor Standards Amendments of 1966.

<sup>130</sup> Section 14 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950 and the Fair Labor Standards Amendments of 1966.

Sec. 16(d)

tary, as provided therein, of a minimum wage rate applicable to such work.<sup>131</sup>

(e) *Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—*

(1) *deducted from any sums owing by the United States to the person charged;*

(2) *recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or*

(3) *ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.*

*Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes", 29 U.S.C. 9a).*

Injunction Proceedings

SEC. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to

be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).<sup>132</sup>

Relation to Other Laws

SEC. 18. (a) No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

(b) *Notwithstanding any other provision of this Act (other than section 13(f)) or any other law—*

(1) *any Federal employee in the Canal Zone engaged in employment of the kind described in section 5103(c)(7) of title 5, United States Code; or*<sup>133</sup>

(2) *any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces;*<sup>134</sup>

*shall have his basic compensation fixed or adjusted at a wage rate which is not less than the appropriate wage rate provided for in section 6(a)(1) of this Act (except that the wage rate provided for in section 6(b) shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 7(a)(1) of this Act*

<sup>131</sup> As amended by section 12 of the Fair Labor Standards Amendments of 1966.

<sup>132</sup> Paragraph (1), as amended by Public Law 90-564, 81 Stat. 1343, applies to certain Federal employees covered under paragraph (1) of this subsection as created in the Fair Labor Standards Amendments of 1966. Section 106, which completes an exemption under the Act. Amendments are now incorporated in 5 U.S.C. 7311 and 7341.

<sup>133</sup> Paragraph (2) was formerly paragraph 3. A subsection (b) was inserted in the Fair Labor Standards Amendments of 1966, as amended, and it is renumbered in the amendment by Public Law 90-564, 81 Stat. 1343, which created the former paragraph (b). Referring to employees described in 10 U.S.C. 741 because of repeal of the latter provision by Public Law 86-754, 40 Stat. 663.

<sup>134</sup> Section 4 of the American Samoa Labor Standards Amendments of 1956, as amended by section 162 of the Act of August 30, 1957 (71 Stat. 1314), effective November 27, 1957.

*Sec. 19*

**Separability of Provisions**

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.<sup>145</sup>

<sup>145</sup> The Fair Labor Standards Amendments of 1949 were approved October 26, 1949, the Fair Labor Standards Amendments of 1955 were approved August 12, 1955, the American Samoa Labor Standards Amendments were approved August 8, 1956, the Fair Labor Standards Amendments of 1961 were approved May 5, 1961, the Fair Labor Standards Amendments of 1966 were approved September 23, 1966, the Fair Labor Standards Amendments of 1974 were approved April 8, 1974, and the Fair Labor Standards Amendments of 1977 were approved November 1, 1977.



## ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1977

(91 Stat. 1245)

[PUBLIC LAW 95-151]

[95TH CONGRESS] [FIRST SESSION]

### AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Amendments of 1977".

[Sections 2(a) through 2(d) and sections 3 through 14, inclusive, of the Fair Labor Standards Amendments of 1977 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

### Increase in Minimum Wage

SEC. 2. \* \* \*

(e)(1) There is established the Minimum Wage Study Commission (hereinafter in this subsection referred to as the "Commission") which shall conduct a study of the Fair Labor Standards Act of 1938 and the social, political, and economic ramifications of the minimum wage, overtime, and other requirements of that Act. Such study shall include but not be limited to—

(A) the beneficial effects of the minimum wage, including its effect in ameliorating poverty among working citizens;

(B) the inflationary impact (if any) of increases in the minimum wage prescribed by that Act;

(C) the effect (if any) such increases have on wages paid employees at a rate in excess of the rate prescribed by that Act;

(D) the economic consequence (if any) of authorizing an automatic increase in the rate prescribed in that Act on the basis of an increase in a wage, price, or other index;

(E) the employment and unemployment effects (if any) of providing a different minimum wage for youth, and the employment and unemployment effects (if any) on handicapped and aged individuals of an increase in

such rate and of providing a different minimum wage rate for such individuals;

(F) the effect (if any) of the full-time student certification program on employment and unemployment;

(G) the employment and unemployment effects (if any) of the minimum wage;

(H) the exemptions from the minimum wage and overtime requirements of that Act;

(I) the relationship (if any) between the Federal minimum wage rates and public assistance programs, including the extent to which employees at such rates are also eligible to receive food stamps and other public assistance;

(J) the overall level of noncompliance with that Act; and

(K) the demographic profile of minimum wage workers.

(2) The Commission shall conduct a study concerning the extent to which the exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938 may apply to employees of conglomerates, and shall make a report, within one year after the date of the appointment of the members of the Commission, of the results of such study. For the purposes of this paragraph a "conglomerate" means an establishment (A) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to the activities of the establishment employing such employees and (B) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$100,000,000 (exclusive of excise taxes at the retail level which are separately stated). The report shall include an analysis of the effects of eliminating the exemptions from the minimum wage and overtime requirements of such Act that may currently apply to the employees of such conglomerates.

(3) The Commission shall make a report of the results of the study conducted pursuant to paragraph (1) thirty-six months after the date of the appointment of the members



of the Commission. The report shall include such recommendations for legislation as the Commission determines are appropriate. The Commission may make interim or additional reports which it determines are appropriate. Each report shall be made to the President and to the Congress. The Commission shall cease to exist thirty days after the submission of the report required by this paragraph.

(4)(A) The Commission shall consist of eight members as follows:

(i) Two members appointed by the Secretary of Labor.

(ii) Two members appointed by the Secretary of Commerce.

(iii) Two members appointed by the Secretary of Agriculture.

(iv) Two members appointed by the Secretary of Health, Education, and Welfare.

The appointments authorized under this paragraph shall be made within 180 days after the date of enactment of this subsection.

(B) The Chairperson shall be selected by the members of the Commission. Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(C)(i) Except as provided in clause (ii), members of the Commission who are officers or employees of the Federal Government shall serve without compensation. Other members, while engaged in the activities of the Commission, shall be paid at a rate equal to the per diem equivalent of the annual rate payable for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code.

(ii) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code.

(5)(A) The Commission may prescribe such rules as may be necessary to carry out its duties under this subsection.

(B) The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it deems advisable.

(C) Upon request of the Commission, the head of any Federal department or agency is authorized to detail, on a reimbursable basis, any of the personnel of such

department or agency to the Commission to assist it in carrying out its duties under this subsection.

(D) The Department of Labor shall furnish such professional, technical, and research assistance as required by the Commission.

(E) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request to carry out its duties under this subsection.

(F) The Commission may secure directly from any department or agency of the United States such information as the Commission may require to carry out its duties under this subsection. Upon request of the Commission, the head of any such department or agency shall furnish such information to the Commission.

(G) The Commission may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

(6)(A) The Chairperson may appoint an executive director of the Commission who shall perform such duties as the Chairperson may prescribe.

(B) With approval of the Chairperson, the executive director may appoint and fix the pay of such clerical personnel as are necessary for the Commission to carry out its duties.

(C) The executive director and staff shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates but at rates not in excess of the annual rate payable for grade GS-18 of the General Schedule under section 5332 of such title.

(D) The executive director, with the concurrence of the Chairperson, may obtain temporary and intermittent services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code.

#### Effective Date

SEC. 15. (a) Except as provided in sections 3, 14, and subsection (b) of this section, the amendments made by this Act shall take effect January 1, 1978.

(b) The amendments made by sections 8, 9, 11, 12, and 13 shall take effect on the date of the enactment of this Act.

(c) On and after the date of the enactment of this Act, the Secretary of Labor shall take such administrative action as may be necessary for the implementation of the amendments made by this Act.

Approved November 1, 1977.

## ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1974

(88 Stat. 55)

[PUBLIC LAW 93-259]

[93RD CONGRESS] [2D SESSION]

### AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Amendments of 1974".

[Sections 2 through 6(d)(1) and sections 7 through 27, inclusive, of the Fair Labor Standards Amendments of 1974 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act. Section 6(d)(2)(A) and (B) amends the Portal-to-Portal Act of 1947 and is set forth below.]

### Federal and State Employees

#### SEC. 6. \* \* \*

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought

*under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspensions shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction."*

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16".

### Effective Date

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

## ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1966

(80 Stat. 830)

[PUBLIC LAW 89-601]

[89TH CONGRESS] [2D SESSION]

### AN ACT

To amend the Fair Labor Standards Act of 1938 to extend its protection to additional employees, to raise the minimum wage, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Amendments of 1966".

[Sections 101 to 501, inclusive, and section 601 (a) of the Fair Labor Standards Amendments of 1966 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

### STATUTE OF LIMITATIONS

SEC. 601. \* \* \*

(b) Section 6(a) of the Portal-to-Portal Act of 1947 (Public Law 49, Eightieth Congress) is amended by inserting before the semicolon at the end thereof the following: "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued".

### EFFECTIVE DATE

SEC. 602. Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.

### STUDY OF EXCESSIVE OVERTIME

SEC. 603. The Secretary of Labor is hereby instructed to commence immediately a complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job

opportunities in American industry. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such survey with appropriate recommendations.

### CANAL ZONE EMPLOYEES AND PANAMA CANAL STUDY

SEC. 604. The Secretary of Labor, in cooperation with the Secretary of Defense and the Secretary of State, shall (1) undertake a study with respect to (A) wage rates payable to Federal employees in the Canal Zone engaged in employment of the kind described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082(7)) and (B) the requirements of an effective and economical operation of the Panama Canal, and (2) report to the Congress not later than July 1, 1968, the results of his study together with such recommendations as he may deem appropriate.

### STUDY OF WAGES PAID HANDICAPPED CLIENTS IN SHELTERED WORKSHOPS

SEC. 605. The Secretary of Labor is hereby instructed to commence immediately a complete study of wage payments to handicapped clients of sheltered workshops and of the feasibility of raising existing wage standards in such workshops. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such study with appropriate recommendations.

### PREVENTION OF DISCRIMINATION BECAUSE OF AGE

SEC. 606. The Secretary of Labor is hereby directed to submit to the Congress not later than January 1, 1967, his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to section 715 of Public Law 88-352. Such legislative recommendations shall include, without limitation, provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Approved September 23, 1966.

## ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1961

(75 Stat. 65)

[PUBLIC LAW 87-30]

[87TH CONGRESS] [1ST SESSION]

### AN ACT

To amend the Fair Labor Standards Act of 1938, as amended, to provide coverage for employees of large enterprises engaged in retail trade or service and of other employers engaged in commerce or in the production of goods for commerce, to increase the minimum wage under the Act to \$1.25 an hour, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Amendments of 1961".

[Sections 2 to 12, inclusive, of the Fair Labor Standards Amendments of 1961 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

### EFFECTIVE DATE

Sec. 14. The amendments made by this Act shall take effect upon the expiration of one hundred and twenty days after the date of its enactment, except as otherwise provided in such amendments and except that the authority to promulgate necessary rules, regulations, or orders with regard to amendments made by this Act, under the Fair Labor Standards Act of 1938 and amendments thereto, including amendments made by this Act, may be exercised by the Secretary on and after the date of enactment of this Act.

Approved May 5, 1961.



## ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1949

(63 Stat. 917)

[PUBLIC LAW 393—81ST CONGRESS]

[CHAPTER 736—1ST SESSION]

### AN ACT

To provide for the amendment of the Fair Labor Standards Act of 1938, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Amendments of 1949".

[Sections 2 to 15, inclusive, of the Fair Labor Standards Amendments of 1949 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

### MISCELLANEOUS AND EFFECTIVE DATE

SEC. 16. (a) The amendments made by this Act shall take effect upon the expiration of ninety days from the date of its enactment; except that the amendment made by section 4 shall take effect on the date of its enactment.

(b) Except as provided in section 3(o) and in the last sentence of section 16(c) of the Fair Labor Standards Act of 1938, as amended, no amendment made by this Act shall be construed as amending, modifying, or repealing any provision of the Portal-to-Portal Act of 1947.

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or

agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.<sup>1</sup>

(d) No amendment made by this Act shall affect any penalty or liability with respect to any act or omission occurring prior to the effective date of this Act; but, after the expiration of two years from such effective date, no action shall be instituted under section 16(b) of the Fair Labor Standards Act of 1938, as amended, with respect to any liability accruing thereunder for any act or omission occurring prior to the effective date of this Act.

(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had section 7(d) (6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.<sup>2</sup>

Approved, October 26, 1949.

<sup>1</sup> Effective May 24, 1950, all functions of Administrator were transferred to the Secretary of Labor by Reorganization Plan No. 6 of 1950, 64 Stat. 1263. See text set out under section 4(a) of the Fair Labor Standards Act.

<sup>2</sup> The provisions of the repealed statute are now contained in substance in sections 7(e)(5), 16(c), (7), and 17 of the Fair Labor Standards Act as amended.



## PERTINENT PROVISIONS AFFECTING THE FAIR LABOR STANDARDS ACT FROM THE PORTAL-TO-PORTAL ACT OF 1947

(61 Stat. 84)

[PUBLIC LAW 49—80TH CONGRESS]

[CHAPTER 52—1ST SESSION]

[H.R. 2157]

### AN ACT

To relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### PART I

#### FINDINGS AND POLICY

SECTION 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by

them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and

Bacon-Davis Acts and that it is therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

\* \* \* \* \*

### PART III

#### FUTURE CLAIMS

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place

where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

### PART IV

#### MISCELLANEOUS

\* \* \* \* \*

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;*<sup>1</sup>

\* \* \* \* \*

(d) *with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a*

<sup>1</sup> As amended by section 601 of the Fair Labor Standards Amendments of 1966, 80 Stat 830.

*district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.*<sup>2</sup>

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

\* \* \* \* \*

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of em-

ployers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Secretary of Labor<sup>3</sup>;

\* \* \* \* \*

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16<sup>4</sup> of such Act.

\* \* \* \* \*

SEC. 13. DEFINITIONS.—

(a) When the terms “employer”, “employee”, and “wage” are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

\* \* \* \* \*

(e) As used in section 6 of the term “State” means any State of the United States or the District of Columbia or any Territory or possession of the United States.

SEC. 14. SEPARABILITY.—If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 15. SHORT TITLE.—This Act may be cited as the “Portal-to-Portal Act of 1947”.

Approved May 14, 1947.

<sup>3</sup> As amended by Reorganization Plan No. 6 of 1950, 64 Stat. 1263.

<sup>4</sup> The Fair Labor Standards Amendments of 1974 struck “(b)” after “section 16”

<sup>2</sup> Added by the Fair Labor Standards Amendments of 1974, 88 Stat. 75

## ADDITIONAL PROVISIONS OF EQUAL PAY ACT OF 1963

(77 Stat. 56)

[PUBLIC LAW 88-38]

[88TH CONGRESS, S. 1409]

[JUNE 10, 1963]

### AN ACT

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Equal Pay Act of 1963".

### DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

[Section 3 of the Equal Pay Act of 1963 amends section 6 of the Fair Labor Standards Act by adding a new subsection (d). The amendment is incorporated in the revised text of the Act.]

### EFFECTIVE DATE

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.

Approved June 10, 1963, 12 m.



## DAVIS-BACON ACT

[Public—No. 403—74th Congress]

[S. 3303]

AN ACT

To amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics employed by contractors and subcontractors on public buildings.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors or subcontractors, and for other purposes," approved March 3, 1931, is amended to read as follows:

"That the advertised specifications for every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which

may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

"Sec. 2. Every contract within the scope of this Act shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

"Sec. 3. (a) The Comptroller General of the United States is hereby authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to this Act; and the Comptroller General of the United States is further authorized and is directed to distribute



a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

"(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall have the right of a action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

"Sec. 4. This Act shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

"Sec. 5. This Act shall take effect thirty days after its passage, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the passage of this Act.

"Sec. 6. In the event of a national emergency the President is authorized to suspend the provisions of this Act.

"Sec. 7. The funds appropriated and made available by the Emergency Relief Appropriation Act of 1935 (Public Resolution Numbered 11, 74th Congress), are hereby made available for the fiscal year ending June 30, 1936, to the Department of Labor for expenses of the administration of this Act."

Approved, August 30, 1935.

#### AMENDMENT

[Public—No. 633—76th Congress]

[Chapter 373—3d Session]

[S. 3650]

#### AN ACT

To require the payment of prevailing rates of wages on Federal public works in Alaska and Hawaii.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1 of the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes," approved March 3, 1931 (46 Stat. 1494), as amended, is further amended by striking out the words "States of the Union or the District of Columbia" and inserting in lieu thereof "States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia"; and by striking out the words "or other civil subdivision of the State" and inserting in lieu thereof "or other civil subdivision of the State, or the Territory of Alaska or the Territory of Hawaii".

Sec. 2. The amendments made by this Act shall take effect on the thirtieth day after the date of enactment of this Act, but shall not affect any contract in existence on such effective date or made thereafter pursuant to invitations for bids outstanding on the date of enactment of this Act.

Approved, June 15, 1940.

[40 U. S. Code, sec. 276a-7]

The fact that any contract authorized by any Act is entered into without regard to section 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a-5 of this title, if such Act would otherwise be applicable to such contract. March 23, 1941, 12 noon, ch. 26, 55 Stat. 50; Aug. 21, 1941, ch. 395, 55 Stat. 658.

## AMENDMENT

[Public—No. 88-349—88th Congress]

July 2, 1964

[H.R. 6041]

### AN ACT

To amend the prevailing wage section of the Davis-Bacon Act, as amended; and related sections of the Federal Airport Act, as amended; and the National Housing Act, as amended.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1 of the Act of March 3, 1931, as amended (46 Stat. 1494, as amended; 40 U.S.C. 276a), is hereby amended by designating the language of the present section as subsection (a) and by adding at the end thereof the following new subsection (b):

Federal construction contract laborers. Fringe benefits. 49 Stat. 1011. 78 STAT. 238. 78 STAT. 239.

"(b) As used in this Act the term 'wages', 'scale of wages', 'wage rates', 'minimum wages', and 'prevailing wages' shall include—

"(1) the basic hourly rate of pay; and

"(2) the amount of—

"(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

Trustee contribution. Benefit costs.

"(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any such benefits;

*Provided*, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as this Act and other Acts incorporating this Act by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2) (A), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in paragraph (2) (B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

Payor obligations, method of payment.

"In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under this Act, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater."

Overtime pay computation, exclusion of benefit costs.

Sec. 2. Section 15(b) of the Federal Airport Act, as amended (60 Stat. 178, as amended; 49 U.S.C. 1114(b)), is hereby amended by inserting the words "in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5)" after the words "Secretary of Labor."

Airport projects. 63 Stat. 480. 49 Stat. 1011. Housing projects. 53 Stat. 807; 73 Stat. 667. 12 USC 1715c.

Sec. 3. Section 212(a) of the National Housing Act, as amended (53 Stat. 208, as amended; 12 U.S.C. 1715(c)), is hereby amended by inserting the words "in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5)," after the words "Secretary of Labor."

Effective date. 78 STAT. 239. 78 STAT. 240.

Sec. 4. The amendments made by this Act shall take effect on the ninetieth day after the date of enactment of this Act, but shall not affect any contract in existence on such effective date or made thereafter pursuant to invitations for bids outstanding on such effective date and the rate of payments specified by section 1(b) (2) of the Act of March 3, 1931, as amended by this Act, shall, during a period of two hundred and seventy days after such effective date, become effective only in those cases and reasonable classes of cases as the Secretary of Labor, acting as rapidly as practicable to make such rates of payments fully effective, shall by rule or regulation provide.



REGULATIONS

TITLE 29  
SUBTITLE A  
PART 3  
OF THE CODE OF FEDERAL REGULATIONS

## PAYMENT AND REPORTING OF WAGES

CONTRACTORS AND SUBCONTRACTORS ON PUBLIC  
BUILDING AND PUBLIC WORK AND ON BUILDING  
AND WORK FINANCED IN WHOLE OR IN PART BY  
LOANS OR GRANTS FROM THE UNITED STATES

[This publication conforms to the Code of Federal Regulations as  
of January 17, 1973, the date this reprint was authorized.]



UNITED STATES DEPARTMENT OF LABOR  
*Employment Standards Administration*  
*Wage and Hour Division*  
WASHINGTON, D.C. 20210

WH Publication 1243 Rev.

## **Title 29—LABOR**

### **Subtitle A—Office of the Secretary of Labor**

#### **PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES**

Sec.

- 3.1 Purpose and scope.
- 3.2 Definitions.
- 3.3 Weekly statement with respect to payment of wages.
- 3.4 Submission of weekly statements and the preservation and inspection of weekly payroll records.
- 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.
- 3.6 Payroll deductions permissible with the approval of the Secretary of Labor.
- 3.7 Applications for the approval of the Secretary of Labor.
- 3.8 Action by the Secretary of Labor upon applications.
- 3.9 Prohibited payroll deductions.
- 3.10 Methods of payment of wages.
- 3.11 Regulations part of contract.

**AUTHORITY:** The provisions of this Part 3 issued under R.S. 161, sec. 2, 48 Stat. 848; Reorg. Plan No. 14 of 1950, 64 Stat. 1267; 5 U.S.C. 301, 133z-15 note; 40 U.S.C. 276c.

**SOURCE:** The provisions of this Part 3 appear at 29 F.R. 97, Jan. 4, 1964, unless otherwise noted.



# Title 29—Labor

## Subtitle A—Office of the Secretary of Labor

### **PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES**

#### **Section 3.1 Purpose and scope.**

This part prescribes “anti-kickback” regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. The part is intended to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the various statutes dealing with Federally-assisted construction that contain similar minimum wage provisions, including those provisions which are not subject to Reorganization Plan No. 14 (e.g., the College Housing Act of 1950, the Federal Water Pollution Control Act, and the Housing Act of 1959), and in the enforcement of the overtime provisions of the Contract Work Hours and Safety Standards Act whenever they are applicable to construction work. The part details the obligation of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered thereby; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

#### **Section 3.2 Definitions.**

As used in the regulations in this part:

(a) The terms “building” or “work” generally include construction activity as distinguished from manufacturing, furnishing of materials, or

servicing and maintenance work. The terms include, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals; dredging, shoring, scaffolding, drilling, blasting, excavating, clearing, and landscaping. Unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, the manufacture or furnishing of materials, articles, supplies, or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a “building” or “work” within the meaning of the regulations in this part.

(b) The terms “construction,” “prosecution,” “completion,” or “repair” mean all types of work done on a particular building or work at the site thereof, including, without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, by persons employed at the site by the contractor or subcontractor.

(c) The terms “public building” or “public work” include building or work for whose construction, prosecution, completion, or repair, as defined above, a Federal agency is a contracting party, regardless of whether title thereof is in a Federal agency.

(d) The term “building or work financed in whole or in part by loans or grants from the United States” includes building or work for whose construction, prosecution, completion, or

repair, as defined above, payment or part payment is made directly or indirectly from funds provided by loans or grants by a Federal agency. The term does not include building or work for which Federal assistance is limited solely to loan guarantees or insurance.

(e) Every person paid by a contractor or subcontractor in any manner for his labor in the construction, prosecution, completion, or repair of a public building or public work or building or work financed in whole or in part by loans or grants from the United States is "employed" and receiving "wages," regardless of any contractual relationship alleged to exist between him and the real employer.

(f) The term "any affiliated person" includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with the contractor or subcontractor as parent, subsidiary or otherwise, and an officer or agent of such corporation.

(g) The term "Federal agency" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

### **Section 3.3 Weekly statement with respect to payment of wages.**

(a) As used in this section, the term "employee" shall not apply to persons in classifications higher than that of laborer or mechanic and those who are the immediate supervisors of such employees.

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part 3 and 5 of this subtitle during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of

the contractor or subcontractor who supervises the payment of wages, and shall be on form WH 348, "Statement of Compliance", or on an identical form on the back of WH 347, "Payroll (For Contractors Optional Use)" or on any form with identical wording. Sample copies of WH 347 and WH 348 may be obtained from the Government contracting or sponsoring agency, and copies of these forms may be purchased at the Government Printing Office.

(c) The requirements of this section shall not apply to any contract of \$2,000 or less.

(d) Upon a written finding by the head of a Federal agency, the Secretary of Labor may provide reasonable limitations, variations, tolerances, and exemptions from the requirements of this section subject to such conditions as the Secretary of Labor may specify.

[29 F.R. 97, Jan. 4, 1964, as amended at 33 F.R. 10186, July 17, 1968]

### **Section 3.4 Submission of weekly statements and the preservation and inspection of weekly payroll records.**

(a) Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency in charge at the site of the building or work, or, if there is no representative of a Federal or State agency at the site of the building or work, the statement shall be mailed by the contractor or subcontractor, within such time, to a Federal or State agency contracting for or financing the building or work. After such examination and check as may be made, such statement, or a copy thereof, shall be kept available, or shall be transmitted together with a report of any violation, in accordance with applicable procedures prescribed by the United States Department of Labor.

(b) Each contractor or subcontractor shall preserve his weekly payroll records for a period of three years from date of completion of the contract. The payroll records shall set out accurately and completely the name and address of each laborer and mechanic, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. Such payroll records shall be made available at all times

for inspection by the contracting officer or his authorized representative, and by authorized representatives of the Department of Labor.

### **Section 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.**

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(a) Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes.

(b) Any deduction of sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is made without discount or interest. A "bona fide prepayment of wages" is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(c) Any deduction of amounts required by court process to be paid to another, unless, the deduction is in favor of the contractor, subcontractor or any affiliated person, or when collusion or collaboration exists.

(d) Any deduction constituting a contribution on behalf of the person employed to funds established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries, illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of employees, their families and dependents: *Provided, however,* That the following standards are met: (1) The deduction is not otherwise prohibited by law; (2) it is either: (i) Voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of or for the continuation of employment, or (ii) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees; (3) no profit or other benefit is otherwise obtained, di-

rectly or indirectly, by the contractor or subcontractor or any affiliated person in the form of commission, dividend, or otherwise; and (4) the deductions shall serve the convenience and interest of the employee.

(e) Any deduction contributing toward the purchase of United States Defense Stamps and Bonds when voluntarily authorized by the employee.

(f) Any deduction requested by the employee to enable him to repay loans to or to purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes.

(g) Any deduction voluntarily authorized by the employee for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.

(h) Any deduction voluntarily authorized by the employee for the making of contributions to Community Chests, United Givers Funds, and similar charitable organizations.

(i) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however,* That a collective bargaining agreement between the contractor or subcontractor and representatives of its employees provides for such deductions and the deductions are not otherwise prohibited by law.

(j) Any deduction not more than for the "reasonable cost" of board, lodging, or other facilities meeting the requirements of section 3(m) of the Fair Labor Standards Act of 1938, as amended, and Part 531 of this title. When such a deduction is made the additional records required under § 516.27 (a) of this title shall be kept.

(k) Any deduction for the cost of safety equipment of nominal value purchased by the employee as his own property for his personal protection in his work, such as safety shoes, safety glasses, safety gloves, and hard hats, if such equipment is not required by law to be furnished by the employer, if such deduction is not violative of the Fair Labor Standards Act or prohibited by other law, if the cost on which the deduction is based does not exceed the actual cost to the employer where the equipment is purchased from him and does not include any direct or indirect monetary return to the employer where the equipment is purchased from a third person, and if the deduction is either (1) voluntarily consented to by the employee in writing and in advance of the period



in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or (2) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees.

[29 F.R. 97, Jan. 4, 1964, as amended at 36 F.R. 9770, May 28, 1971]

### **Section 3.6 Payroll deductions permissible with the approval of the Secretary of Labor.**

Any contractor or subcontractor may apply to the Secretary of Labor for permission to make any deduction not permitted under § 3.5. The Secretary may grant permission whenever he finds that:

(a) The contractor, subcontractor, or any affiliated person does not make a profit or benefit directly or indirectly from the deduction either in the form of a commission, dividend, or otherwise;

(b) The deduction is not otherwise prohibited by law;

(c) The deduction is either (1) voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance, or (2) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees; and

(d) The deduction serves the convenience and interest of the employee.

### **Section 3.7 Applications for the approval of the Secretary of Labor.**

Any application for the making of payroll deductions under § 3.6 shall comply with the requirements prescribed in the following paragraphs of this section:

(a) The application shall be in writing and shall be addressed to the Secretary of Labor.

(b) The application need not identify the contract or contracts under which the work in question is to be performed. Permission will be given for deductions on all current and future contracts of the applicant for a period of 1 year. A renewal of permission to make such payroll deduction will be granted upon the submission of an application which makes reference to the original application, recites the date of the Secretary of Labor's approval of such deductions, states affirmatively that

there is continued compliance with the standards set forth in the provisions of § 3.6, and specifies any conditions which have changed in regard to the payroll deductions.

(c) The application shall state affirmatively that there is compliance with the standards set forth in the provisions of § 3.6. The affirmation shall be accompanied by a full statement of the facts indicating such compliance.

(d) The application shall include a description of the proposed deduction, the purpose to be served thereby, and the classes of laborers or mechanics from whose wages the proposed deduction would be made.

(e) The application shall state the name and business of any third person to whom any funds obtained from the proposed deductions are to be transmitted and the affiliation of such person, if any, with the applicant.

[29 F.R. 97, Jan. 4, 1964, as amended at 36 F.R. 9771, May 28, 1971]

### **Section 3.8 Action by the Secretary of Labor upon applications.**

The Secretary of Labor shall decide whether or not the requested deduction is permissible under provisions of § 3.6; and shall notify the applicant in writing of his decision.

### **Section 3.9 Prohibited payroll deductions.**

Deductions not elsewhere provided for by this part and which are not found to be permissible under § 3.6 are prohibited.

### **Section 3.10 Methods of payment of wages.**

The payment of wages shall be by cash, negotiable instruments payable on demand, or the additional forms of compensation for which deductions are permissible under this part. No other methods of payment shall be recognized on work subject to the Copeland Act.

### **Section 3.11 Regulations part of contract.**

All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this subtitle.

## **"ANTI-KICKBACK" ACT, COPELAND ACT**

### **TITLE 18, U.S.C.**

#### **§ 874. Kickbacks from public works employees:**

"Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

[18 U.S.C. 874 (June 25, 1948, ch. 645, § 1, 62 Stat. 740, eff. Sept. 1, 1948) replaces the former § 1 of the Copeland Act of June 13, 1934 (48 Stat. 948), which was codified as 40 U.S.C. 276b prior to its repeal by 62 Stat. 862, eff. Sept. 1, 1948]

### **TITLE 40, U.S.C. (as amended)**

#### **§ 276c. Regulations governing contractors and subcontractors:**

"The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or

buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and sub-

contractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 of the United States Code (Criminal Code and Criminal Procedure) shall apply to such statements."

[40 U.S.C. 276c, as amended (48 Stat. 948, as amended by 62 Stat. 862, 63 Stat. 108, and 72 Stat. 967) constitutes the Copeland Act in its present form, which is a revision of section 2 of the original Act of June 13, 1934, section 1 of the original Act was repealed coincidentally with its replacement by 18 U.S.C. 874, set out above.]

*Reorganization Plan No. 14 of 1950* (15 F.R. 3176, 64 Stat. 1267, 5 U.S.C.A. APPX.):

"In order to assure coordination of administration and consistency of enforcement of the labor standards provision of each of the [foregoing and other enumerated] Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, . . ."







# **Regulations, Part 5: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction**

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Title 29, Part 5 of the  
Code of Federal Regulations

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division

WH Publication 1244  
(Revised April 1979)



**PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)**

**Subpart A—General**

Sec.

- 5.0 Suspension of certain provisions of this part and revocation of the suspension.
- 5.1 Purpose and scope.
- 5.2 Definitions.
- 5.3-5.4 [Reserved]
- 5.5 Contract provisions and related matters.
- 5.6 Enforcement.
- 5.7 Reports to the Secretary of Labor.
- 5.8 Review of recommendations for an appropriate adjustment in liquidated damages under the Contract Work Hours and Safety Standards Act.
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- 5.10 Restitution, criminal action.
- 5.11 Department of Labor investigations, hearings.
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- 5.13 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.
- 5.14 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standard Act.
- 5.15 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.
- 5.16 Withdrawal of approval of a training program.
- 5.17 Appeal from Bureau of Apprenticeship and Training's decisions.

**Subpart B—Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act**

- 5.20 Scope and significance of this subpart.
- 5.21 [Reserved]
- 5.22 Effect of the Davis-Bacon fringe benefits provisions.
- 5.23 The statutory provisions.
- 5.24 The basic hourly rate of pay.

- 5.25 Rate of contribution or cost for fringe benefits.
- 5.26 " \* \* \* contribution irrevocably made \* \* \* to a trustee or to a third person".
- 5.27 " \* \* \* fund, plan, or program".
- 5.28 Unfunded plans.
- 5.29 Specific fringe benefits.
- 5.30 Types of wage determinations.

- 5.31 Meeting wage determination obligations.
- 5.32 Overtime payments.

AUTHORITY: Reorg. Plan No. 14 of 1950, 64 Stat. 1267; sec. 2, 48 Stat. 948; sec. 10, 61 Stat. 89; 5 U.S.C. 301, 133z-15 note, 29 U.S.C. 258; 40 U.S.C. 276c, unless otherwise noted.

**Subpart A—General**

- § 5.0 Suspension of certain provisions of this part and revocation of the suspension.

(a) Effective February 23, 1971, and until otherwise provided, certain of the provisions of this part, as set forth in paragraph (c) of this section, were suspended pursuant to Proclamation 4031 (36 FR 3457) promulgated by the President on February 23, 1971, under the authority provided in section 6 of the Davis-Bacon Act (40 U.S.C. 276a-5).

(b) Proclamation 4031 suspended, as to all contracts entered into on or subsequent to February 23, 1971, and until otherwise provided—

(1) The provisions of the Davis-Bacon Act of March 31, 1931, as amended, and the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act; and

(2) The provisions of any Executive order, proclamation, rule, regulation, or other directive providing for the payment of wages, which provisions are dependent upon determinations by

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the Secretary of Labor under the Davis-Bacon Act.

(c) Except with respect to contracts entered into prior to February 23, 1971, the following provisions of this part were suspended, effective on such date and until otherwise provided, pursuant to Proclamation 4031 as set forth in paragraphs (a) and (b) of this section:

(1) The provisions of §§ 5.3 and 5.4, in their entirety;

(2) The provisions of paragraph (a) of § 5.5, insofar as they prescribe the inclusion in contracts of clauses set forth in paragraphs (c)(1) through (4) of such section or authorized modifications thereof;

(3) The provisions of paragraphs (c) (6) and (7) of § 5.5(a), insofar as they require the inclusion in contracts and subcontracts of references to the clauses prescribed by paragraphs (c) (1) through (4) of § 5.5(a); and

(4) The provisions of §§ 5.6 and 5.7.

(d) The suspension referred to in paragraphs (a) and (b) of this section did not apply to:

(1) The provisions of § 5.5(c); or to

(2) The application of any provisions of this part to contracts entered into prior to February 23, 1971. With respect to contracts entered into prior to such date all provisions of this part, as modified in accordance with the guidelines, orders, and organizational description published in the FEDERAL REGISTER of Friday, January 8, 1971 (36 FR 304-308) remain in effect.

(e) The suspension of the provisions of this part referred to in paragraphs (a) and (c) of this section is now revoked pursuant to Proclamation No. 4040 of the President dated March 29, 1971, which revoked Proclamation No. 4031 of February 23, 1971, as to all construction contracts, whether for direct Federal construction or federally assisted construction, for which so-

licitations for bids or proposals are issued after March 29, 1971, the date of Proclamation No. 4040. Attention is directed to the fact that this revocation does not affect the validity of contracts entered into after February 23, 1971, without Davis-Bacon rates pursuant to authority of Proclamation No. 4031, including contracts let after March 29, 1971, pursuant to solicitations for bids or proposals issued on or before March 29, 1971.

(Proclamation No. 4040, 40 U.S.C. 276a-5)  
[36 FR 6427, Apr. 3, 1971]

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon him under Reorganization Plan No. 14 of 1950:

1. The Davis-Bacon Act (sec. 1-7, 46 Stat. 1494, as amended; Pub. L. 74-403, 40 U.S.C. 276a-276a-7).

2. Copeland Act (40 U.S.C. 276c).

3. The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330).

4. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).

5. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

6. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86-272, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).

7. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

8. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as



amended).

9. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 684(b)(5)).

10. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).

11. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91-230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92-318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.

12. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113(a), as amended), see particularly the amendments in the Federal-Aid Highway Act of 1968 (Pub. L. 90-495, 62 Stat. 815).

13. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).

14. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

15. Rehabilitation Act of 1973 (sec. 306(b)(5), 87 Stat. 384, 29 U.S.C. 776(b)(5)).

16. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

17. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).

18. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).

19. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).

20. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).

21. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).

22. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C.

App. 402).

23. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).

24. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).

25. Health Professions Educational Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2256, 42 U.S.C. 293a(c)(7)).

26. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 364; 42 U.S.C. 296a(b)(5)).

27. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).

28. Safe Drinking Water Act (sec. 2(a), see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j-9(e)).

29. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o-3(b)(1)(H)).

30. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).

31. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

32. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

33. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

34. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c-3).

35. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

36. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).

37. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).

38. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).

39. Housing and Urban Development Act

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of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).

40. Older Americans Act of 1965 (sec. 502, Pub. L. 89-73, as amended by sec. 501, Pub. L. 93-29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).

41. Public Works and Economic Development Act of 1965 (sec. 712; 79 Stat. 575 as amended; 42 U.S.C. 3222).

42. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).

43. New Communities Act of 1968 (sec. 410, 82 Stat. 516; 42 U.S.C. 3909).

44. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

45. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

46. Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).

47. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).

48. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

49. Energy Conservation and Production Act (sec. 451(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

50. Solid Waste Disposal Act (sec. 2, 90 Stat. 2828; 42 U.S.C. 6979).

51. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).

52. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).

53. Highway Speed Ground Transportation Study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

54. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

55. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281i).

56. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4)). **NOTE.**—Repealed December 9, 1969, and labor standards incorporated in sec. 1-1431 of the District of Columbia Code).

57. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89-694, but not in the United States Code).

58. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87-328) (considered a statute for purposes of the plan but

not in the United States Code).

(b) Sections 1.5 and 1.7 of this subtitle contain the Department's procedural rules governing requests for wage determinations under the Davis-Bacon Act and its related statutes listed in § 1.1 of this subtitle and the use of such wage determinations.

[29 FR 99, Jan. 4, 1964, as amended at 30 FR 13136, Oct. 15, 1965; 40 FR 30481, July 21, 1975; 43 FR 32131, July 25, 1978]

## § 5.2 Definitions.

As used in this part:

(a) The term "Agency Head" means the principal official of the Federal Agency and includes those persons duly authorized to act in his behalf;

(b) The term "Contracting Officer" means the individual, his duly appointed successor, or his authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency, or other administering agency;

(c) The terms apprentice and trainee are defined as follows:

(1) "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a

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program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

(d) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision, issued prior to the award of the construction contract, except that under the National Housing Act changes in the decision shall be effective if made at any time prior to the beginning of construction. The use of the wage determination shall be subject to the provisions of § 1.7 of this title.

(e) The term "contract" means any contract within the scope of the labor standards provisions of any of the acts listed in § 5.1 and which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution, except where a different meaning is expressly indicated;

(f) The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports,

terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(g) The terms "construction", "procurement", "completion", or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, by persons employed by the contractor or subcontractor. A mere token beginning of the work shall not be deemed to be the "beginning of construction" as that



term is used in the National Housing Act.

(h) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. However, the term "initial construction" in the Federal-Aid Highway Act of 1956 does not include repair or maintenance work.

(i) Every person paid by a contractor or subcontractor in any manner for his labor in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States, is "employed" and receiving "wages", regardless of any contractual relationship alleged to exist.

(j) The term "Federal agency" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

(k) The term "wages" (and its singular form) has the meaning prescribed in section 1(b) of the Davis-Bacon Act.

[29 FR 99, Jan. 4, 1964, as amended at 29 FR 13463, Sept. 30, 1964; 40 FR 30481, July 21, 1975; 41 FR 10063, Mar. 9, 1976]

#### §§ 5.3-5.4 [Reserved]

#### § 5.5 Contract provisions and related matters.

(a) The Agency Head shall cause or require to be inserted in full in any contract subject to the labor standards provisions of any of the acts listed in § 5.1, except those subject only to the Contract Work Hours and Safety Standards Act, the following clauses or any modifications thereof to meet the particular needs of the agency if first approved by the Department of Labor:

(1) *Minimum wages.* (i) All mechanics and laborers employed or working upon the site of the work, or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amounts due at time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics; and the wage determination decision shall be posted by the contractor at the site of the work in a prominent place where it can be easily seen by the workers. For the purpose of this clause, contributions made or costs reasonably anticipated under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv). Also for the purpose of this clause, regular contributions made or costs incurred for more than a weekly period under plans, funds, or programs, but covering the particularly weekly period, are deemed to be constructively made or incurred during such weekly period.

(ii) The contracting officer shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conform-

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ably to the wage determination and a report of the action taken shall be sent by the Federal agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classifications or reclassification of a particular class of laborers and mechanics, including apprentices and trainees, to be used, the question accompanied by the recommendation of the contracting officer shall be referred to the Secretary for final determination.

(iii) The contracting officer shall require, whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly wage rate and the contractor is obligated to pay a cash equivalent of such a fringe benefit, an hourly cash equivalent thereof to be established. In the event the interested parties cannot agree upon a cash equivalent of the fringe benefit, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for determinations.

(iv) If the contractor does not make payments to a trustee or other third person, he may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing benefits under a plan or program of a type expressly listed in the wage determination decision of the Secretary of Labor which is a part of this contract: *Provided, however*, The Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding.* The (write in name of Federal agency) may withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices and trainees, employed by the contractor or any subcontractor on the work the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice or trainee, employed or working on the site of the work or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the

project, all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work, or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project. Such records will contain the name and address of each such employee, his correct classification, rates of pay (including rates of contributions or costs anticipated of the types described in section 1(b)(2) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(ii) The contractor will submit weekly a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The copy shall be accompanied by a statement signed by the employer or his agent indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work he performed. A submission of a "Weekly Statement of Compliance"



### 55.5(a)(3)(ii)

which is required under this contract and the Copeland regulations of the Secretary of Labor (29 CFR, Part 3) and the filing with the initial payroll or any subsequent payroll of a copy of any findings by the Secretary of Labor under 29 CFR 5.5(a)(1)(iv) shall satisfy this requirement. The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The contractor will make the records required under the labor standards clauses of the contract available for inspection by authorized representatives of the (write the name of agency) and the Department of Labor, and will permit such representatives to interview employees during working hours on the job. Contractors employing apprentices or trainees under approved programs shall include a notation on the first weekly certified payrolls submitted to the contracting agencies that their employment is pursuant to an approved program and shall identify the program.

(4) *Apprentices and trainees*—(i) *Apprentices*. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not a trainee as defined in subdivision (ii) of this subparagraph or is not registered or otherwise employed as stated above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish to the contracting officer or a representa-

tive of the Wage-Hour Division of the U.S. Department of Labor written evidence of the registration of his program and apprentices as well as the appropriate ratios and wage rates (expressed in percentages of the journeyman hourly rates), for the area of construction prior to using any apprentices on the contract work. The wage rate paid apprentices shall be not less than the appropriate percentage of the journeyman's rate contained in the applicable wage determination.

(ii) *Trainees*. Except as provided in 29 CFR 5.15 trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to an individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. The ratio of trainees to journeymen shall not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training. Every trainee must be paid at not less than the rate specified in the approved program for his level of progress. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Bureau of Apprenticeship and Training shall be paid not less than the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish the contracting officer or a representative of the Wage-Hour Division of the U.S. Department of Labor written evidence of the certification of his program, the registration of the trainees, and the ratios and wage rates prescribed in that program. In the event the Bureau of Apprenticeship and Training withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity*. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

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(5) *Compliance with Copeland Regulations* (29 CFR Part 3). The contractor shall comply with the Copeland Regulations (29 CFR Part 3) of the Secretary of Labor which are herein incorporated by reference.

(6) *Subcontracts*. The contractor will insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (5) and (7) and such other clauses as the (write in the name of Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(7) *Contract termination; debarment*. A breach of clauses (1) through (6) may be grounds for termination of the contract, and for debarment as provided in 29 CFR 5.6.

(b)(1) In the construction of a dwelling or dwellings insured under 12 U.S.C. 1715v, or 1715w, compliance with the requirements of paragraph (a) of this section may be waived by the Agency Head in cases or classes of cases where laborers or mechanics, not otherwise employed at any time on the project, voluntarily donate their services without full compensation for the purpose of lowering the cost of construction and the Agency Head determines that any amounts saved thereby are fully credited to the non-profit corporation, association, or other organization undertaking the construction.

(2) In construction assisted by any loan or grant under 20 U.S.C. Ch. 21, the Agency Head may waive the application of 20 U.S.C. 753(a) in cases or classes of cases where laborers or mechanics not otherwise employed at any time in the construction of the project, voluntarily donate their services for the purpose of lowering the costs of construction and the Agency Head determines that any amounts saved thereby are fully credited to the educational institution undertaking the construction.

(3) In construction assisted under Section 503 of the Housing Act of 1964, the Agency Head may waive the application of the prevailing wage standards prescribed therein in cases or classes of cases where laborers or mechanics, not otherwise employed at any time on the project, voluntarily donate their services without compensation for the purpose of lowering the costs of construction and the Agency Head determines that any amounts thereby saved are fully credited to the person, corporation, association, organization, or other entity undertaking the project.

(c) The Agency Head shall cause or require the following clauses set forth in paragraphs (c) (1), (2), (3) and (4) of this section to be included in full in any contract subject to the Contract Work Hours and Safety Standards Act. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) *Overtime requirements*. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, as the case may be.

(2) *Violation; liability for unpaid wages; liquidated damages*. In the event of any violation of the clause set forth in subparagraph (1), the contractor and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated



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damages shall be computed with respect to each individual laborer or mechanic employed in violation of the clause set forth in subparagraph (1), in the sum of \$10 for each calendar day on which such employee was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1).

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency) may withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2).

(4) *Subcontracts.* The contractor shall insert in any subcontracts the clauses set forth in subparagraphs (1), (2), and (3) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(d) In any contract required to contain the withholding clause set forth in paragraph (a)(2) of this section, the Federal Agency may modify the clause in paragraph (c)(3) of this section so as to refer only to the withholding and determination of sums for liquidated damages.

(e) In any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in §5.1, the Agency Head shall cause or require to be inserted a clause requiring the maintenance of records containing the information specified in §516.2(a) of this title. Records containing such information shall be preserved for a period of three years from the completion of the contract. Further, the Agency Head shall cause or require to be inserted in any such contract a

clause providing that the records to be maintained under this paragraph shall be available for inspection in the manner that inspection of records is available under the terms of paragraph (a)(3)(ii) of this section.

(f) In contracts subject to section 803 of the National Housing Act, the Agency Head shall cause or require inclusion of the following clause: Every laborer and mechanic employed by the contractor or any subcontractor engaged in the construction of the project, shall receive compensation at a rate of not less than one and one-half times his basic or regular rate of pay for all hours worked in any workweek in excess of eight hours in any workday or forty hours in the workweek, as the case may be.

[29 FR 100, Jan. 4, 1964, as amended at 29 FR 13463, Sept. 30, 1964; 30 FR 13136, Oct. 15, 1965; 36 FR 19304, Oct. 2, 1971; 40 FR 30481, July 21, 1975; 41 FR 10063, Mar. 9, 1976]

## §5.6 Enforcement.

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by §5.5 have been inserted in the contracts. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require that the contracts contain the provisions of §5.5 or such modifications thereof which have been approved by the Department of Labor. No payment, advance, grant, loan or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that he and his subcontractors have complied or that there is a substantial dispute with respect to the required provisions.

(2) The Federal agency shall make such examination of the submitted

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payrolls and statements as may be necessary to assure compliance with the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1. In connection with such examination particular attention should be given to the correctness of classifications and disproportionate employment of laborers, helpers, apprentices or trainees. Such payrolls and statements shall be preserved by the agency for a period of 3 years from the date of completion of the contract and shall be produced at the request of the Secretary of Labor at any time during the 3-year period.

(3) In addition to the examination of payrolls and statements required by paragraph (a)(2) of this section, the Federal agency shall cause the investigations to be made as may be necessary to assure compliance with the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1. Projects where the contract is of short duration (6 months or less) shall be investigated before the work is accepted, if feasible. In the case of contracts which extend over a long period of time the investigation shall be made with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans to determine the correctness of classifications and disproportionate employment of laborers, helpers, apprentices or trainees. Complaints of alleged violations shall be given priority. It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Ac-

cordingly, the identity of an employee who makes a confidential written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal his identity, will not be disclosed without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR Part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

(b)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor or the Agency Head with the concurrence of the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts subject to any of the statutes listed in § 5.1. *Provided, however,* That the Administrator of the Wage and Hour Division shall direct the removal from the debarred bidders list of any contractor or subcontractor whom he has found to have demonstrated a current responsibility to comply with the labor standards provisions applicable to Federal contracts and federally assisted construction work subject to any of the applicable statutes listed in § 5.1. In cases arising under contracts covered by the Davis-Bacon Act, the ineligibility provision prescribed in that act shall govern.

(2) The Agency Head shall furnish

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to the Secretary of Labor for transmittal to the Comptroller General the names of the persons or firms who have been found to have disregarded their obligations to employees. The Comptroller General will distribute a list to all Departments of the Government giving the names of such ineligible persons or firms.

(c)(1) Whenever as a result of an investigation conducted by the Agency or the Department of Labor, the Deputy Administrator of the Wage and Hour Division, Department of Labor, finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in § 5.1 (other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under section 3(a) thereof, he shall promptly notify by registered or certified mail the contractor or subcontractor and its responsible officers, if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding and afford such contractor or subcontractor and any other parties notified an opportunity to present such reasons or considerations as they have to offer relating to why debarment action should not be taken under paragraph (b) of this section or section 3(a) of the Davis-Bacon Act. The Deputy Administrator shall furnish to those notified a summary of the investigative findings, and shall make available to them any information disclosed by the investigation which is not privileged or found confidential for good cause. If this opportunity is requested, an informal proceeding shall be held before an administrative law judge, an Assistant Regional Director for Employment

Standards, or any other departmental officer of appropriate ability. At the conclusion of the informal proceeding, the presiding officer shall issue his decision which shall be served by registered or certified mail upon the interested parties.

(2) Within 30 days after service of the decision, any interested party may file objections to the decision with the Administrator, Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210. Such objections shall be specific, and shall be accompanied by reasons or bases therefor. In his discretion, the Administrator may permit oral argument. If no objections are filed, the decisions of the presiding officer shall be final, except in cases under section 3 of the Davis-Bacon Act as to any action to be taken by the Comptroller General under that section.

(3) The decision of the Administrator shall show a ruling upon each objection presented, and shall include a statement of (i) the findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact, law, or discretion presented on the record, and (ii) an appropriate order or recommendation. The decision of the Administrator shall be final, except in cases accepted for review, upon petition, by the Wage Appeals Board and in cases under section 3 of the Davis-Bacon Act as to any action to be taken by the Comptroller General under that section.

(d) Any person or firm debarred under § 5.6(b) may in writing request removal from the debarment list. The procedure for removal shall be substantially similar to the debarment procedure set forth in paragraph (c) of this section. That is, the person or firm shall have an opportunity to demonstrate in an informal proceeding a current responsibility to comply



with the labor standards provisions applicable to Federal contracts and to federally assisted construction work and to file objections to the presiding officer's decision for consideration by the Administrator.

(Secs. 104, 105, 76 Stat. 358, 359; 40 U.S.C. 330, 331)

[29 FR 102, Jan. 4, 1964, as amended at 40 FR 30481, July 21, 1975]

#### § 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments total less than \$500 and are nonwillful, and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations, except where the Department of Labor has expressly requested that the investigation be made. In the latter case, the investigating agency shall submit a factual summary report including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed, corrective measures taken (such as "letters of notice"), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments total \$500 or more, or are willful, the Federal agency shall furnish to the Department of Labor, as soon as practicable, a detailed enforcement report. The report should be prepared in accordance with the "Investigation and Enforcement Manual" published by the Department of Labor with respect to "Labor Standards Provisions Applicable to Contracts Covering Federally-Financed and Assisted Construction". In cases involving underpayments under the Davis-Bacon Act, the report should meet the reporting require-

ments contained in Comptroller General's Letter B-3368, dated March 19, 1957.

(b) *Semi-annual enforcement reports.* To assist the Secretary in fulfilling his responsibilities under Reorganization Plan No. 14 of 1950, Federal agencies shall furnish to the Secretary by April 30 and October 31 of each calendar year semi-annual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts covering the periods of October 1 through March 31 and April 1 through September 30, respectively. Such reports shall be prepared in the manner prescribed in circular memoranda of the Secretary.

(c) *Additional information.* Upon request, the Agency Head shall transmit to the Secretary of Labor such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Secretary may find necessary for the performance of his duties with respect to the labor standards provisions referred to in this part.

(d) *Contract termination.* Where the contract is terminated by reason of violations of the labor standards a report shall be submitted to the Secretary of Labor and the Comptroller General giving the name and address of the contractor or subcontractor whose right to proceed has been terminated, the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of his contract, and the description of the work he is to perform.

[29 FR 102, Jan. 4, 1964, as amended at 30 FR 13136, Oct. 15, 1965; 42 FR 54803, Oct. 11, 1977]

**§ 5.8 Review of recommendations for an appropriate adjustment in liquidated damages under the Contract Work Hours and Safety Standards Act.**

(a) *Findings and recommendations by the head of the Agency.* Whenever the head of an agency finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act and to be in excess of \$100.00, is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, he may make recommendations to the Secretary that an appropriate adjustment in liquidated damages be made or that the contractor or subcontractor be relieved of liability for such liquidated damages. Such findings with respect to liquidated damages necessarily include findings with respect to any wage underpayments for which the liquidated damages are determined.

(b) The recommendations of the head of an agency submitted to the Department of Labor under paragraph (a) of this section shall be reviewed initially by the Deputy Administrator of the Wage and Hour Division. Whenever the Deputy Administrator concurs in the findings and recommendations of the head of the agency, he shall issue an order to that effect, which shall be the final action of the Department of Labor with respect to the issues involved. Whenever the Deputy Administrator makes findings differing from those of the head of the agency, his decision shall be transmitted forthwith to the Administrator of the Wage and Hour Division for review. The Administrator shall issue a decision and order. In its discretion,

the Wage Appeals Board may review the decision and order of the Administrator.

(c) Whenever the head of an agency finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act and to be \$100.00 or less is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, he may make an appropriate adjustment in such liquidated damages or relieve the contractor or subcontractor of liability for such liquidated damages without submitting recommendations to this effect to the Secretary. This delegation of authority is made under section 105 of the Contract Work Hours and Safety Standards Act and has been found to be necessary and proper in the public interest to prevent undue hardship and to avoid serious impairment of the conduct of Government business.

(5 U.S.C. 301, secs. 104, 105, 76 Stat. 358, 359; 40 U.S.C. 330, 331)

[29 FR 103, Jan. 4, 1964, as amended at 33 FR 8448, June 7, 1968]

**§ 5.9 Suspension of funds.**

In the event of failure or refusal of the contractor or any subcontractor to comply with labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in § 5.1, the Federal agency shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which

they are entitled and to cover any liquidated damages which may be due.

[29 FR 103, Jan. 4, 1964]

#### § 5.10 Restitution, criminal action.

(a) The Agency Head may, in appropriate cases where violations of the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1 resulting in underpayment of wages to employees are found to be nonwillful, request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of fringe benefit prescribed in the applicable wage determination.

(b) In cases where the Agency Head finds substantial evidence that such violations are willful and in violation of a criminal statute, the Agency Head shall forward the matter to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Secretary of Labor shall be informed of the action taken.

[29 FR 103, Jan. 4, 1964, as amended at 29 FR 13464, Sept. 30, 1964]

#### § 5.11 Department of Labor investigations, hearings.

(a) The Secretary of Labor shall cause to be made such investigations as he deems necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Head of an agency for an appropriate adjustment in liquidated damages assessed under the Contract Work Hours and Safety Standards Act. Federal agencies, contractors, subcontractors, sponsors, applicants or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in inter-

views with workers, and in all other aspects of the investigation. Any authorized representative of the Department of Labor under this section is deemed a person designated to aid in the enforcement of the overtime standards required by the Contract Work Hours and Safety Standards Act within the meaning of section 104(a) of that Act. A report of the investigation of such representative shall be transmitted to proper officers of the United States, any territory or possession, as the case may be, as required by the aforesaid section 104(a).

(b) In the event of disputes concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations, the Secretary of Labor may, upon request by a Federal agency or on his own motion, direct a hearing to be held. For the purpose of the hearing the Chief Administrative Law Judge shall, in writing, designate an administrative law judge who shall, after notice to all interested parties, make such investigation and conduct such hearings as may be necessary and render a decision embodying his findings and conclusions and if wages are found to be due, the amounts thereof. The administrative law judge's decision shall be sent to the interested parties and shall be final unless a petition for review of the decision by the Administrator of the Wage and Hour Division is filed by any such parties in quadruplicate with the Chief Administrative Law Judge, United States Department of Labor, Washington, D.C. 20036, within 20 days after receipt thereof. The petition for review must set out separately and particularly each objection asserted. The petition for review and the record which shall include the administrative law judge's decision then shall be certified by the



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administrative law judge to the Administrator. The petitioner may file a brief (original and four copies) in support of his petition within the 20-day period and any interested party upon whom the administrative law judge's decision has been served may within 10 days after the expiration of the time for filing the petition for review, file a brief in support of, or in opposition to the administrative law judge's decision. The Administrator's decision shall be subject to such further review by the Wage Appeals Board, as it may provide in its discretion.

[29 FR 103, Jan. 4, 1964, as amended at 40 FR 30482, July 21, 1975]

## § 5.12 Rulings and interpretations.

All questions arising in any agency relating to the application and interpretation of the rules contained in this part and in Parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Secretary for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Secretary of Labor, United States Department of Labor, Washington D.C. 20210.

[29 FR 103, Jan. 4, 1964]

## § 5.13 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.

The Secretary may make variations, tolerances, and exemptions from the requirements of this part and those of Parts 1 and 3 of this subtitle whenever he finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship.

[29 FR 103, Jan. 4, 1964]

## § 5.14 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

(a) *General.* Upon his own initiative or upon the request of any Federal agency, the Secretary of Labor may provide under section 105 of the Contract Work Hours and Safety Standards Act reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of that Act whenever he finds such action to be necessary and proper in the public interest to prevent injustice, or undue hardship, or to avoid serious impairment of the conduct of Government business. Any request for such action by the Secretary shall be submitted in writing, and shall set forth the reasons for which the request is made.

(b) *Exemptions.* Pursuant to section 105 of the Contract Work Hours and Safety Standards Act, the following classes of contracts are found exempt from all provisions of that Act in order to prevent injustice, undue hardship, or serious impairment of Government business:

(1) Agreements entered into by or on behalf of the Commodity Credit Corporation providing for the storing in or handling by commercial warehouses of wheat, corn, oats, barley, rye, grain sorghums, soybeans, flaxseed, rice, naval stores, tobacco, peanuts, dry beans, seeds, cotton, and wool.

(2) Sales of surplus power by the Tennessee Valley Authority to States, counties, municipalities, cooperative organization of citizens or farmers, corporations and other individuals pursuant to section 10 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831i).

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(3) Contracts of \$2,000.00 or less.

(4) Purchases and contracts other than construction contracts in the aggregate amount of \$2,500.00 or less. In arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising.

(5) Contract work performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: A State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; Johnston Island; Canton Island; and the Canal Zone.

(c) *Tolerances.* (1) The "basic rate of pay" under section 102 of the Contract Work Hours and Safety Standards Act may be computed as an hourly equivalent to the rate on which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 207), as interpreted in Part 778 of this title. This tolerance is found to be necessary and proper in the public interest in order to prevent undue hardship.

(2) Concerning the tolerance provided in paragraph (c)(1) of this section, the provisions of section 7(d)(2) of the Fair Labor Standards Act and §778.7 of this title should be noted. Under these provisions, payments for occasional periods when no work is performed, due to vacations, and similar causes are excludable from the "regular rate" under the Fair Labor

Standards Act. Such payments, therefore, are also excludable from the "basic rate" under the Contract Work Hours and Safety Standards Act.

(3) See §5.8(c) providing a tolerance subdelegating authority to the heads of agencies to make appropriate adjustments in the assessment of liquidated damages totaling \$100.00 or less under specified circumstances.

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice comes within the definition contained in §5.2(c).

(iii) The time in question does not involve productive work or performance of the apprentice's regular duties.

(d) *Variations.* (1) In order to prevent undue hardship, a workday consisting of a fixed and recurring 24-hour period commencing at the same time on each calendar day may be used in lieu of the calendar day in applying the daily overtime provisions of the Act to the employment of firefighters or fireguards, under the following conditions: (i) Where such employment is under a platoon system requiring such employees to remain at or within the confines of their post of duty in excess of eight hours per day in a standby or on-call status; and (ii) if the use of such alternate 24-hour day has been agreed upon between the employer and such employees or their authorized representatives before performance of the work; and (iii) provided that, in determining the daily and the weekly overtime requirements of the Act in any particular workweek of any such employee whose established workweek begins at an hour of the calendar day different from the



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hour when such agreed 24-hour day commences, the hours worked in excess of 8 hours in any such 24-hour day shall be counted in the established workweek (of 168 hours commencing at the same time each week) in which such hours are actually worked.

(2) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully both the unpaid wages due laborers and mechanics and the liquidated damages due the United States, the available funds shall be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, shall be used for the payment of liquidated damages.

(3) In the performance of any contract entered into pursuant to the provisions of 38 U.S.C. 620 to provide nursing home care of veterans, no contractor or subcontractor under such contract shall be deemed in violation of Section 102 of the Contract Work Hours and Safety Standards Act by virtue of failure to pay the overtime wages required by such section for work in excess of 8 hours in any calendar day or 40 hours in the workweek to any individual employed by an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive days for the purpose of overtime com-

pensation and if such individual receives compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less than 1½ times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

(Sec. 105, 76 Stat. 359; 40 U.S.C. 331)

[29 FR 104, Jan. 4, 1964, as amended at 29 FR 13464, Sept. 30, 1964, 30 FR 7819, June 17, 1965; 32 FR 1088, Jan. 31, 1967; 34 FR 18753, Nov. 22, 1969; 36 FR 8949, May 15, 1971; 38 FR 19970, July 26, 1973; 42 FR 62132, Dec. 9, 1977]

**§ 5.15 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.**

(a) Notwithstanding the provisions of § 5.5(a)(4)(ii) relating to the utilization of trainees on Federal and federally assisted construction, no contractor shall be required to obtain approval of a training program which, prior to August 20, 1975, was approved by the Department of Labor for purposes of the Davis-Bacon and Related Acts, was established by agreement of organized labor and management and therefore recognized by the Department, and/or was recognized by the Department under Executive Order 11246, as amended. A copy of the program and evidence of its prior approval, if applicable, shall be submitted to the Bureau of Apprenticeship and Training, which shall certify such prior approval or recognition of the program. In every other respect, the provisions of § 5.5(a)(4)(ii)— including those relating to registration of trainees, permissible ratios, and wage rates to be paid—shall apply to these programs.

(b) Every trainee employed on a contract executed on and after August 20,

1975, in one of the above training programs must be individually registered in the program in accordance with BAT procedures, and must be paid at the rate specified in the program for his level of progress. Any such employee listed on the payroll at a trainee rate who is not registered and participating in a program certified by BAT pursuant to this section, or approved and certified by BAT pursuant to § 5.5(a)(4)(ii), must be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The ratio of trainees to journeymen shall not be greater than permitted by the terms of the program.

(c) In the event a program which was recognized or approved prior to August 20, 1975, is modified, revised, extended, or renewed, the changes in the program or its renewal must be approved by the Bureau of Apprenticeship and Training before they may be placed into effect.

[40 FR 30483, July 21, 1975]

**§ 5.16 Withdrawal of approval of a training program.**

If at any time the Bureau of Apprenticeship and Training determines, after opportunity for a hearing, that the standards of any program, whether it is one recognized or approved prior to August 20, 1975, or a program subsequently approved, have not been complied with, or that such a program fails to provide adequate training for participants, a contractor will no longer be permitted to utilize trainees at less than the predetermined rate for the classification of work actually performed until an acceptable program is approved. If the contractor brings an appeal pursuant to § 5.17 within 30 days of his receipt of a certified letter withdrawing the Bureau of Apprenticeship and Training's approv-

al, the effect of the withdrawal of approval of the program will be delayed until a decision is rendered on the appeal.

[40 FR 30483, July 21, 1975]

**§ 5.17 Appeal from Bureau of Apprenticeship and Training's decisions.**

(a) Appeal from a withdrawal of approval of a training program by the Bureau of Apprenticeship and Training pursuant to § 5.16 may be made to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, D.C. 20210. Appeals brought more than 30 days after the contractor's receipt of notice of withdrawal of approval of a program will be processed, but the effects of withdrawal of approval of the program will not be delayed during consideration of such an appeal.

(b) Appeal from disapproval of new training programs whose approval is requested pursuant to these regulations may be made to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, D.C. 20210.

(c) The Assistant Secretary for Employment and Training (or his designee) shall examine the complete record on the basis of which the denial was issued, including the application for the program, supporting data, Bureau of Apprenticeship and Training decision, and any written argument which the applicant may submit, and any reply thereto by the Bureau of Apprenticeship and Training. Copies of any such reply shall be served on the applicant. The Assistant Secretary, or his designee, shall approve or disapprove the decision of the Bureau or shall advise what modifications are necessary for approval of the program. This decision by the Assistant Secretary or his designee shall be final.

[40 FR 30483, July 21, 1975, as amended at 41 FR 10063, Mar. 9, 1976]

## **Subpart B—Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act**

SOURCE: 29 FR 13465, Sept. 30, 1964, unless otherwise noted.

### **§ 5.20 Scope and significance of this subpart.**

The 1964 amendments (Pub. L. 88-349) to the Davis-Bacon Act require, among other things, that the prevailing wage determined for Federal and federally-assisted construction include: (a) The basic hourly rate of pay; and (b) the amount contributed by the contractor or subcontractor for certain fringe benefits (or the cost to them of such benefits). The purpose of this subpart is to explain the provisions of these amendments. This subpart makes available in one place official interpretations of the fringe benefits provisions of the Davis-Bacon Act. These interpretations will guide the Department of Labor in carrying out its responsibilities under these provisions. These interpretations are intended also for the guidance of contractors, their associations, laborers and mechanics and their organizations, and local, State and Federal agencies, who may be concerned with these provisions of the law. The interpretations contained in this subpart are authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 359). The omission to discuss a particular problem in this subpart or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor with respect to such problem or to constitute an administrative interpretation, practice, or en-

forcement policy. Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.12.

### **§ 5.21 [Reserved]**

### **§ 5.22 Effect of the Davis-Bacon fringe benefits provisions.**

The Davis-Bacon Act and the prevailing wage provisions of the related statutes listed in § 1.1 of this subtitle confer upon the Secretary of Labor the authority to predetermine, as minimum wages, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is to be performed. See paragraphs (a) and (b) of § 1.2 of this subtitle. The fringe benefits amendments enlarge the scope of this authority by including certain bona fide fringe benefits within the meaning of the terms "wages", "scale of wages", "wage rates", "minimum wages" and "prevailing wages", as used in the Davis-Bacon Act.

### **§ 5.23 The statutory provisions.**

The fringe benefits provisions of the 1964 amendments to the Davis-Bacon Act are, in part, as follows:

(b) As used in this Act the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) The basic hourly rate of pay; and

(2) The amount of—

(A) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected.



for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits \* \* \*.

**§ 5.24 The basic hourly rate of pay.**

"The basic hourly rate of pay" is that part of a laborer's or mechanic's wages which the Secretary of Labor would have found and included in wage determinations prior to the 1964 amendments. The Secretary of Labor is required to continue to make a separate finding of this portion of the wage. In general, this portion of the wage is the cash payment made directly to the laborer or mechanic. It does not include fringe benefits.

**§ 5.25 Rate of contribution or cost for fringe benefits.**

(a) Under the amendments, the Secretary is obligated to make a separate finding of the rate of contribution or cost of fringe benefits. Only the amount of contributions or costs for fringe benefits which meet the requirements of the act will be considered by the Secretary. These requirements are discussed in this subpart.

(b) The rate of contribution or cost is ordinarily an hourly rate, and will be reflected in the wage determination as such. In some cases, however, the contribution or cost for certain fringe benefits may be expressed in a formula or method of payment other than an hourly rate. In such cases, the Secretary may in his discretion express in the wage determination the rate of contribution or cost used in the formula

or method or may convert it to an hourly rate of pay whenever he finds that such action would facilitate the administration of the Act. See § 5.5(a)(1)(i) and (iii).

**§ 5.26 " \* \* \* contribution irrevocably made \* \* \* to a trustee or to a third person".**

Under the fringe benefits provisions (Section 1(b)(2) of the Act) the amount of contributions for fringe benefits must be made to a trustee or to a third person irrevocably. The "third person" must be one who is not affiliated with the contractor or subcontractor. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the contractor or subcontractor be able to recapture any of the contributions paid in or any way divert the funds to his own use or benefit. Although contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the contractor or subcontractor of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the contractor or subcontractor. In such a case the return

by the insurance company to the contractor or subcontractor of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the contractor or subcontractor, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan. (See Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

§ 5.27 " \* \* \* fund, plan, or program".

The contributions for fringe benefits must be made pursuant to a fund, plan or program (sec. 1(b)(2)(A) of the act). The phrase "fund, plan, or program" is merely intended to recognize the various types of arrangements commonly used to provide fringe benefits through employer contributions. The phrase is identical with language contained in section 3(1) of the Welfare and Pension Plans Disclosure Act. In interpreting this phrase, the Secretary will be guided by the experience of the Department in administering the latter statute. (See Report of Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

§ 5.28 Unfunded plans.

(a) The costs to a contractor or subcontractor which may be reasonably anticipated in providing benefits of the types described in the act pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the act (see 1(b)(2)(B) of the act). The legislative history suggests that these provisions were intended to permit the consideration of fringe benefits meeting, among others, these requirements and which are provided from the general

assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4.)

(b) No type of fringe benefit is eligible for consideration as a so-called unfunded plan unless:

(1) It could be reasonably anticipated to provide benefits described in the act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program; and

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected. (See S. Rep. No. 963, p. 6.)

(c) It is in this manner that the act provides for the consideration of unfunded plans or programs in finding prevailing wages and in ascertaining compliance with the Act. At the same time, however, there is protection against the use of this provision as a means of avoiding the act's requirements. The words "reasonably anticipated" are intended to require that any unfunded plan or program be able to withstand a test which can perhaps be best described as one of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the act, an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with the act. (See S. Rep. No. 963, p. 6.) The legislative history suggests that in order to insure against the possibility that these provisions might be used to avoid compliance with the act, the committee contemplates that the Secretary of Labor in carrying out his responsibilities under Reorganization Plan No. 14 of 1950, may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial princi-



ples, will be sufficient to meet the future obligation under the plan. The preservation of this account for the purpose intended would, of course, also be essential. (S. Rep. No. 963, p. 6.) This is implemented by the contractual provisions required by § 5.5(a)(1)(iv).

#### § 5.29 Specific fringe benefits.

(a) The act lists all types of fringe benefits which the Congress considered to be common in the construction industry as a whole. These include the following: medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, vacation and holiday pay, defrayment of costs of apprenticeship or other similar programs, or other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits.

(b) The legislative history indicates that it was not the intent of the Congress to impose specific standards relating to administration of fringe benefits. It was assumed that the majority of fringe benefits arrangements of this nature will be those which are administered in accordance with requirements of section 302(c)(5) of the National Labor Relations Act, as amended (S. Rep. No. 963, p. 5).

(c) The term "other bona fide fringe benefits" is the so-called "open end" provision. This was included so that new fringe benefits may be recognized by the Secretary as they become prevailing. It was pointed out that a particular fringe benefit need not be recognized beyond a particular area in order for the Secretary to find that it

is prevailing in that area. (S. Rep. No. 963, p. 6).

(d) The legislative reports indicate that, to insure against considering and giving credit to any and all fringe benefits, some of which might be illusory or not genuine, the qualification was included that such fringe benefits must be "bona fide" (H. Rep. No. 308, p. 4; S. Rep. No. 963, p. 6). No difficulty is anticipated in determining whether a particular fringe benefit is "bona fide" in the ordinary case where the benefits are those common in the construction industry and which are established under a usual fund, plan, or program. This would be typically the case of those fringe benefits listed in paragraph (a) of this section which are funded under a trust or insurance program. Contractors may take credit for contributions made under such conventional plans without requesting the approval of the Secretary of Labor under § 5.5(a)(1)(iv).

(e) Where the plan is not of the conventional type described in the preceding paragraph, it will be necessary for the Secretary to examine the facts and circumstances to determine whether they are "bona fide" in accordance with requirements of the act. This is particularly true with respect to unfunded plans. Contractors or subcontractors seeking credit under the act for costs incurred for such plans must request specific permission from the Secretary under § 5.5(a)(1)(iv).

(f) The act excludes fringe benefits which a contractor or subcontractor is obligated to provide under other Federal, State, or local law. No credit may be taken under the act for the payments made for such benefits. For example, payment for workmen's compensation insurance under either a compulsory or elective State statute are not considered payments for fringe benefits under the Act. While each sit-

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uation must be separately considered on its own merits, payments made for travel, subsistence or to industry promotion funds are not normally payments for fringe benefits under the Act. The omission in the Act of any express reference to these payments, which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide fringe benefits under the Act.

### § 5.30 Types of wage determinations.

(a) When fringe benefits are prevailing for various classes of laborers and mechanics in the area of proposed construction, such benefits are includable in any Davis-Bacon wage determina-

tion. Illustrations, contained in paragraph (c) of this section, demonstrate some of the different types of wage determinations which may be made in such cases.

(b) Wage determinations of the Secretary of Labor under the act do not include fringe benefits for various classes of laborers and mechanics whenever such benefits do not prevail in the area of proposed construction. When this occurs the wage determination will contain only the basic hourly rates of pay, that is only the cash wages which are prevailing for the various classes of laborers and mechanics. An illustration of this situation is contained in paragraph (c) of this section.

(c) Illustrations:

Classes	Basic hourly rates	Fringe benefits payments				Others
		Health and welfare	Pensions	Vacations	Apprenticeship program	
Laborers.....	\$3.25					
Carpenters.....	4.00	\$0.15				
Painters.....	3.90	.15	\$0.10	\$0.20		
Electricians.....	4.85	.10	.15			
Plumbers.....	4.95	.15	.20		\$0.05	
Ironworkers.....	4.60			.10		

(It should be noted this format is not necessarily in the exact form in which determinations will issue; it is for illustration only.)

### § 5.31 Meeting wage determination obligations.

(a) A contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge his minimum wage obligations for the payment of both straight time wages and fringe benefits by paying in cash, making payments or incurring costs for "bona fide" fringe benefits of the types listed in the applicable wage determination or otherwise found prevailing by the Secretary of Labor, or

by a combination thereof.

(b) A contractor or subcontractor may discharge his obligations for the payment of the basic hourly rates and the fringe benefits where both are contained in a wage determination applicable to his laborers or mechanics in the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making the contributions for the fringe benefits in the wage determinations, as specified therein. For example, in the illustration contained

in paragraph (c) of § 5.30, the obligations for "painters" will be met by the payment of a straight time hourly rate of not less than \$3.90 and by contributing not less than at the rate of 15 cents an hour for health and welfare benefits, 10 cents an hour for pensions, and 20 cents an hour for vacations; or

(2) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for "bona fide" fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination. For example, the obligations for "painters" in the illustration in paragraph (c) of § 5.30 will be met by the payment of a straight time hourly rate of not less than \$3.90 and by contributions of not less than a total of 45 cents an hour for "bona fide" fringe benefits; or

(3) By paying in cash directly to laborers or mechanics for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, he would meet his obligations for "painters" in the illustration in paragraph (c) of § 5.30, by paying directly to the painters a straight time hourly rate of not less than \$4.35 (\$3.90 basic hourly rate plus 45 cents for fringe benefits); or

(4) As stated in paragraph (a) of this section, the contractor or subcontractor may discharge his minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in paragraphs (b)(1) thru (3) of this section. Thus, for example, his obligations for "painters" may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less

than \$4.35 (\$3.90 basic hourly rate plus 45 cents for fringe benefits). The payments in such case may be \$4.10 in cash and 25 cents in payments or costs in fringe benefits. Or, they may be \$3.75 in cash and 60 cents in payments or costs for fringe benefits.

[30 FR 13136, Oct. 15, 1965]

#### § 5.32 Overtime payments.

(a) The act excludes amounts paid by a contractor or subcontractor for fringe benefits in the computation of overtime under the Fair Labor Standards Act, the Contract Work Hours and Safety Standards Act, and the Walsh-Healey Public Contracts Act whenever the overtime provisions of any of these statutes apply concurrently with the Davis-Bacon Act or its related prevailing wage statutes. It is clear from the legislative history that in no event can the regular or basic rate upon which premium pay for overtime is calculated under the aforementioned Federal statutes be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under section 1(b)(1) of the Davis-Bacon Act. (See S. Rep. No. 963, p. 7.) Contributions by employees are not excluded from the regular or basic rate upon which overtime is computed under these statutes; that is, an employee's regular or basic straight-time rate is computed on his earnings before any deductions are made for the employee's contributions to fringe benefits. The contractor's contributions or costs for fringe benefits may be excluded in computing such rate so long as the exclusions do not reduce the regular or basic rate below the basic hourly rate contained in the wage determination.

(b) The legislative report notes that the phrase "contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursu-



§ 5.32(b)

ant to a fund, plan, or program" was added to the bill in Committee. This language in essence conforms to the overtime provisions of section 7(d)(4) of the Fair Labor Standards Act, as amended. The intent of the committee was to prevent any avoidance of overtime requirements under existing law. See H. Rep. No. 308, p. 5.

(c)(1) The act permits a contractor or subcontractor to pay a cash equivalent of any fringe benefits found prevailing by the Secretary of Labor. Such a cash equivalent would also be excludable in computing the regular or basic rate under the Federal overtime laws mentioned in paragraph (a). For example, the W construction contractor pays his laborers or mechanics \$3.50 in cash under a wage determination of the Secretary of Labor which requires a basic hourly rate of \$3 and a fringe benefit contribution of 50 cents. The contractor pays the 50 cents in cash because he made no payments and incurred no costs for fringe benefits. Overtime compensation in this case would be computed on a regular or basic rate of \$3.00 an hour. However, in some cases a question of fact may be presented in ascertaining whether or not a cash payment made to laborers or mechanics is actually in lieu of a fringe benefit or is simply

part of their straight time cash wage. In the latter situation, the cash payment is not excludable in computing overtime compensation. Consider the examples set forth in paragraphs (c) (2) and (3) of this section.

(2) The X construction contractor has for some time been paying \$3.25 an hour to a mechanic as his basic cash wage plus 50 cents an hour as a contribution to a welfare and pension plan. The Secretary of Labor determines that a basic hourly rate of \$3 an hour and a fringe benefit contribution of 50 cents are prevailing. The basic hourly rate or regular rate for overtime purposes would be \$3.25, the rate actually paid as a basic cash wage for the employee of X, rather than the \$3 rate determined as prevailing by the Secretary of Labor.

(3) Under the same prevailing wage determination, discussed in paragraph (c)(2) of this section, the Y construction contractor who has been paying \$3 an hour as his basic cash wage on which he has been computing overtime compensation reduces the cash wage to \$2.75 an hour but computes his costs of benefits under section 1(b)(2)(B) as \$1 an hour. In this example the regular or basic hourly rate would continue to be \$3 an hour. See S. Rep. No. 963, p. 7.

